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No. 73-1596

In the Supreme Court of the United States

OCTOBER TERM, 1974

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL., PETITIONERS

v.

MOW SUN WONG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1a-23a) is not yet reported. The opinion of the district court (Pet. App. B 24a-35a) is reported at 333 F. Supp. 527.

JURISDICTION

The judgment of the court of appeals (Pet. App. C 36a) was entered on January 25, 1974. The petition for a writ of certiorari was filed on April 24, 1974, and was granted on June 10, 1974 (A. 39). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Civil Service Commission's regulation generally limiting employment in the federal competitive civil service to citizens and other persons owing permanent allegiance to the United States is within the constitutional powers of Congress and the President and hence not a constitutionally forbidden discrimination against aliens.

CONSTITUTIONAL PROVISIONS, STATUTE, EXECUTIVE ORDER, AND REGULATION INVOLVED

1. Article I, Sec. 8, cl. 4, of the Constitution of the United States provides:

> The Congress shall have Power * * * [t]o establish a uniform Rule of Naturalization * * *.

2. The Fifth Amendment to the Constitution of the United States provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

3. Section 1753 of the Revised Statutes, 16 Stat. 514, and Section 2 of the Civil Service Act of 1883, 22 Stat. 403, as amended, 5 U.S.C. 3301, provide in pertinent part as follows:

> The President may—
>
> (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
>
> (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and

> (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

4. Executive Order No. 10577, 19 Fed. Reg. 7521 (November 22, 1954), provides in pertinent part:

> By virtue of the authority vested in me by the Constitution, by Section 1753 of the Revised Statutes (5 U.S.C. 631), by the Civil Service Act of January 16, 1883 (22 Stat. 403), by section 301 of title 3 of the United States Code, and as President of the United States, it is hereby ordered as follows:
>
> * * * *
>
> Sec. 2.1. * * * (a) * * * The [Civil Service] Commission is authorized to establish standards, with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations.

5. Section 338.101 of the Civil Service Commission's regulations, 5 C.F.R. 338.101, provides in pertinent part:

> (a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.
>
> (b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. However, a non-citizen may be given (1) a limited executive assignment under section 305.509 of this chapter in the absence of qualified citizens or (2) an appointment in rare cases under section 316.601 of this chap-

ter, unless the appointment is prohibited by statute.

STATEMENT

Respondents, all aliens, instituted this class action on December 22, 1970, in the United States District Court for the Northern District of California, on behalf of themselves and "all other non-citizens of the United States who are similarly situated," challenging the validity of the Civil Service Commission's regulation (5 C.F.R. 338.101) requiring that applicants for most positions in the competitive civil service be citizens of the United States or persons owing permanent allegiance to the United States (A. 3-14).[1]

Respondent Mow Sun Wong was informed that he was ineligible for permanent employment as a janitor with the General Services Administration because of his alienage (A. 25).[2] Respondent Siu Hung Mok was informed that he was ineligible for permanent employment as a file clerk with GSA because of his

[1] In addition to citizens, non-citizen nationals also owe permanent allegience to the United States. 8 U.S.C. 1101(a)(21), (22), 1408. Non-citizen nationals are generally natives of insular or outlying possessions of the United States but, due to the extension of citizenship in some instances and the grant of independence in others, there are now relatively few non-citizen nationals (see p. 81, *infra*, n. 67). See generally 2 Gordon & Rosenfield, ***Immigration Law and Procedure*** ¶ 11.3b (1974 rev. ed.).

[2] Mow Sun Wong immigrated to the United States from Hong Kong in June 1969 (A. 24). At the time this action was instituted he was employed by the California Supplemental Training and Employment Program ("STEP"), having been assigned under that program in August 1970 to receive training as a janitor with GSA (A. 5, 7, 25). His employment under STEP was scheduled to terminate in February 1971 (A. 5). He filed a declaration of intent to become a citizen of the United States in August 1970 (A. 4, 33).

Prior to enactment of the Immigration and Nationality Act of 1952, aliens seeking naturalization as United States citizens were in certain cases required to file a declaration of intent to become a citizen, a requirement dating from 1795. 1 Stat. 414, as amended, 8 U.S.C. (1946 ed.) 731. Since various rights and privileges of aliens under both federal law (see, *e.g.*, p. 45, *infra*, n. 34) and state law (*e.g.*, *Terrace* v. *Thompson*, 263 U.S. 197) depend upon whether an alien has filed such a declaration, the practice of accepting such declarations has been continued by the 1952 Act (8 U.S.C. 1445(f)), even though the declaration is optional and has no operative significance for the purposes of that Act. See 1 Gordon & Rosenfield, *supra*, ¶ 1.34b, at 1-120, n. 11; H. Rep. No. 1365, 82d Cong., 2d Sess., p. 82; S. Rep. No. 1137, 82d Cong., 2d Sess., p. 44.

[3] Siu Hung Mok immigrated to the United States from Macao in October 1968 (A. 25), and filed a declaration of intent to become a citizen in August 1970 (A. 5, 34). He was employed by the California STEP program (A. 7, 26), and in August 1970 was placed with GSA's Federal Records Center to receive training as a file clerk (A. 26).

[4] Francene Lum came to the United States from China in September 1946 (A. 27), and apparently has never filed a declaration of intent to become a citizen or sought naturalization. She has attended college and universities in this

alienage (A. 26).[3] Respondent Francene Lum sought a position as an evaluator of educational programs in the Department of Health, Education and Welfare in November 1970 (A. 27), but was informed by the Federal Job Information Center that she did not qualify for a rating test due to her alienage (A. 8, 28).[4]

Respondent Kae Cheong Lui was hired by the former Post Office Department for a brief period in 1970 to load and unload mail, but his employment was terminated when the postal authorities learned that he was not a citizen (A. 20, 28).[5] Also a plaintiff, but not a respondent here because she did not appeal, was Anna Yu, who sought a position as a clerk typist with the federal government but was informed she could not take the typing test because she was not a citizen (A. 8, 26-27).[6]

Asserting a "constitutional right to have the opportunity to be employed in a competitive Federal Civil Service position" (A. 4), respondents allege in

country and has taught high school for some fifteen years (*ibid.*).

[5] Kae Cheong Lui came to the United States from China in September 1968 (A. 28), but apparently has never filed a declaration of intent to become a citizen.

Under the Postal Reorganization Act (84 Stat. 719, 39 U.S.C. 101, *et seq.*), the United States Postal Service replaced the Post Office Department. Under Section 410 of the Act, which became effective on April 13, 1971, the Civil Service Act and the regulations promulgated thereunder by the Civil Service Commission do not apply to the Postal Service. Under existing regulations of the Postal Service, permanent resident aliens are no longer disqualified from most lower and middle level positions in the Service. Sec. 317.3, *Personnel Handbook P-11*, U.S. Postal Service, as amended on May 2, 1974 (*Postal Bulletin*, May 2, 1974, p. 2).

[6] Anna Yu came to the United States in 1965 from Hong Kong (A. 26), and apparently has never filed a declaration of intent to become a citizen or sought naturalization. She has attended college and university in this country (A. 7-8, 26).

their complaint: *first*, that the regulation discriminates against them arbitrarily and irrationally on the basis of alienage, and denies them "their rights to equal protection of the laws under the Due Process Clause of the Fifth Amendment" (A. 4, 10-11); and, *second*, that the regulation denies them rights under Executive Order No. 11,478, which bans discrimination in federal employment on the basis, *inter alia*, of "national origin" (A. 4, 12-13).[7] Later, without formally amending their complaint, respondents urged in the district court that the regulation also contravenes Section 502 of the Public Works Appropriation Act, 1970.[8] Named as defendants were

[7] The complaint also alleged that the limitation constitutes an impermissible discrimination on grounds of "national origin," in violation of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, concerning federally-assisted programs (A. 4, 12), but Section 601 is inapplicable to direct federal employment, and this claim was not pursued.

[8] That Act (83 Stat. 323, 336-337) prohibits, with certain exceptions, the payment of salary of any employee of the United States whose post of duty is in the continental United States—

> [U]nless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on the date of enactment of this Act, who, being eligible for citizenship, had filed a declaration of intention to become a citizen of the United States prior to such date, (3) is a person who owes allegiance to the United States, or (4) is an alien from Poland or the Baltic countries lawfully admitted to the United States for permanent residence * * *.

Respondents Mow Sun Wong and Siu Hung Mok filed affidavits in support of their motion for summary judgment declaring that they owe allegience to the United States (A. 33-34). The other respondents have made no such declaration.

the Chairman and the Commissioners of the United States Civil Service Commission, petitioners here, and other government officials.[6]

The complaint sought: (1) an injunction "preventing defendants and all other federal agencies from continuing to deny [them] • • • the opportunity to compete for jobs in the federal competitive civil service;" (2) a writ of mandamus compelling the defendants to submit for court approval a plan for the recruitment and employment of non-citizens in the competitive federal civil service; and (3) a declaratory judgment "that the rules and regulations, promulgated by the United States Civil Service Commission and all other federal agencies, which deny non-citizens the opportunity to compete for federal employment violate • • • [respondents'] Constitutional and statutory rights to equal opportunity to pursue such jobs" (A. 13).

Prior to answer, respondents moved for summary judgment (A. 29-30), and petitioners moved to dismiss the action on the ground, among others, that the complaint failed to state a claim upon which relief could be granted (A. 30).

[6] The other defendants below were the Executive Director of the Commission, its Regional Director in San Francisco, the Administrator of the General Services Administration and its Regional Administrator in San Francisco, the Secretary of the Department of Health, Education and Welfare and that Department's Regional Director in the San Francisco area, and the former Postmaster General, along with two regional officers of the former Post Office Department (A. 3, 5-6). None of these defendants has any responsibility for the establishment of standards that applicants for federal civil service employment must meet, and accordingly they did not join in the petition for a writ of certiorari. They will, of course, be governed by any ruling made here.

In a memorandum opinion and order issued on August 30, 1971 (Pet. App. B 24a-35a), the district court denied respondents' motion, granted petitioners' motion, and ordered the complaint dismissed.

The court held that Section 338.101 of the Commission's regulations did not conflict with the Appropriations Act or the Executive Order (Pet. App. B 28a-31a). The court rejected respondents' Fifth Amendment equal protection claim, holding that the correct standard of scrutiny for the regulation is the rational-basis test: "It is quite rational and reasonable for the Executive, via a grant of power from the Legislature, to determine that the formation of policy and its execution, at whatever level, should be entrusted only to United States citizens." The court perceived as well an alternative rational basis: "[T]he Executive may intend that the economic security of its citizens be served by the reservation of competitive civil service positions to them, rather than to aliens" (*id.* at 31a-34a). The court made no determination whether the action was properly maintainable as a class action, and hence did not define the class putatively represented by respondents.

The court of appeals reversed in an opinion issued January 25, 1974 (Pet. App. A 1a-23a). After deciding that the regulation is within the statutory authority of the Commission and not in conflict with the Appropriation Act or the Executive Order (*id.* at 4a-12a), the court declared the regulation unconsti-

tutional. Relying on this Court's decisions in *Sugarman* v. *Dougall*, 413 U.S. 634, and *Graham* v. *Richardson*, 403 U.S. 365, the court proceeded on the premise that "[a]liens are a 'suspect' class * * *" (Pet. App. A 15a) and that "classifications based on alienage are 'subject to close judicial scrutiny'" (*ibid.*), being justifiable only by "a compelling government interest" (*id.* at 22a). The court declared that Section 338.101 of the Commission's regulations unreasonably discriminates against resident aliens based solely on their status as aliens (Pet. App. A 23a) and that "no logical or persuasive reason [had been] advanced as to why aliens should be excluded from all federal civil service employment" (*ibid.*), and concluded that "in the fact situation of this case and with the broad sweep of the regulation involved, we hold that it is so unjustifiable as to be violative of due process" (*ibid.*).

The court of appeals remanded the case with instructions to grant the injunctive relief sought by respondents (*id.* at 23a). Pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure, the mandate of the court of appeals issued 21 days after the court's decision. Before the Solicitor General had determined to seek review of the decision by this Court, the district court denied the government's application for a stay and on March 18, 1974, enjoined the petitioners "from continuing to deny * * * [the respondents] and all others similarly situated the opportunity to compete for federal employment" (though no class action determination had yet been made) and ordered petitioners to show to the court

within 30 days "all steps taken or to be taken to implement the decision of the Ninth Circuit Court of Appeals" (A. 34-35). Upon being informed that the Solicitor General had filed a petition for a writ of certiorari, the court of appeals, on April 26, 1974, recalled its mandate (A. 35). The district court by order of May 15, 1974, stayed its order of March 18 (A. 35-36). This Court granted certiorari on June 10, 1974 (A. 39).

ARGUMENT

INTRODUCTION AND SUMMARY

The central issue in this case concerns the constitutional power of the federal government to require citizenship as a general qualification for employment in the competitive federal civil service. The court of appeals adjudged the citizenship requirement invalid on the ground that the federal government lacks such power because of the equal protection component of the Fifth Amendment's Due Process Clause. Respondents will presumably seek to sustain the judgment of the court of appeals on the alternative grounds, rejected by both courts below, that the challenged regulation also exceeds the authority provided by, or conflicts with, the relevant statutes and executive order. The core of the case, however, is the constitutional issue. Before proceeding to a more detailed analysis of that issue, we think it useful to outline certain aspects of the government's position.

A. The regulation requiring citizenship as a qualification for federal employment is supported by the

combined powers of the President and the Congress. This Court has frequently recognized that Congress has broad powers to deal with the special status of aliens as part of its plenary power over immigration and naturalization conferred by Article I, Sec. 8, cl. 4, of the Constitution. *E.g., Harisiades* v. *Shaughnessy*, 342 U.S. 580. The President also has powers concerning the status of alienage, as an incident to his constitutional responsibilities both with respect to foreign affairs and national defense and as Chief Executive. Also, the President and Congress may deal with alienage under their shared treaty-making power.

Here Congress has delegated powers to the President and the President has delegated the aspect of his own powers relevant to aliens and federal employment, plus those received from Congress, to the Civil Service Commission. The Commission's regulation thus comes before the Court with the maximum constitutional support the Executive and the Legislature can give. *C. & S. Air Lines, Inc.* v. *Waterman Corp.*, 333 U.S. 103, 109-110.

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. * * * If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. [*Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 635-637 (Jackson, J., concurring).]

However, while the challenged regulations are supported by the vast powers of both Congress and the President, we believe that they may be sustained solely by reference to the power of Congress, so that the case does not require delineation of the perimeters of Presidential power in this area.

B. The Constitution vests in Congress the authority to determine national policy with respect to immigration and naturalization, *i.e.*, the power to establish the conditions under which aliens may enter and remain in this country. Those policy determinations are essentially political in nature and "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 589. If Congress wishes to permit or encourage certain types of immigration and to prohibit or discourage others, it has the plenary power to do so, just as it has the power to encourage or discourage aliens in the United States with respect to becoming naturalized citizens.

For example, if it were so inclined because of national or international economic or political problems or other reasons, Congress presumably could amend the immigration and nationality laws to prohibit further immigration and to require that all aliens leave the country. Less drastically, Congress could provide that aliens may enter or remain in this country only if they refrain from seeking employment (cf. 8 U.S.C. 1182(a)(7),(15)), or from seeking specified types of employment, such as fed-

eral civil service employment (cf. 8 U.S.C. 1182(a)(12), (14)), and that they are subject to deportation if such limitations are not obeyed. Cf. 8 U.S.C. 1251(a)(9).

Federal government employment and the payroll it generates have been recognized as tools to be used in implementing national policies with respect to economic and social problems, and Congress is surely entitled to exercise its plenary powers concerning immigration, naturalization and aliens—powers that a state does not have[10]—in such a fashion to implement such national policies. It cannot seriously be suggested that any law to that effect would be beyond the constitutional powers of Congress, at least where the limitation does not contravene a specific constitutional prohibition, such as the First Amendment.

Surely, then, a less drastic or comprehensive measure having a comparable tendency would be no less valid. The regulation challenged here, which generally excludes aliens from employment in the federal competitive civil service, is such a provision. Having been in effect in one form or another for more than 90 years, the limitation is part of the package of conditions voluntarily accepted by all aliens who have chosen to enter and reside in this country. Yet, should it be violated,[11] neither deportation nor any other sanction is imposed upon the alien.

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[10] Compare *Sugarman* v. *Dougall*, 413 U.S. 634, 643-645.

[11] For example, one of the respondents was briefly employed in a position for which he was later determined to be ineligible due to his alienage (see p. 6, *supra*).

To favor citizens over aliens in this manner is not inherently invidious, for aliens have a variety of advantages and immunities that citizens lack (*e.g.*, *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 585-587), just as citizens have privileges and immunities under the Constitution that aliens lack. As in *Harisiades*, the exercise of federal power over the status of aliens often "bristles with severities" (342 U.S. at 587) much greater than the relatively mild and, if the alien wishes it so, temporary incapacity involved here. Through our history Congress has enacted hundreds of laws making numerous distinctions between the rights, privileges and duties of citizens and those of various categories of aliens (see the Appendix to this Brief). Such laws are interrelated in diverse ways and degrees with foreign affairs.

C. A determination of the powers of the federal government concerning the status of alienage may have important implications for the conduct of our foreign relations, including the power to negotiate effectively concerning the status of Americans who travel or reside as aliens in foreign countries. The rights of aliens are for that reason a frequent subject of the treaty-making power. The mechanical application of equal protection standards governing classifications according to race would go far to eliminate the legal differences between the status of citizens and of aliens, a result that is itself inconsistent with the Constitution, and would as an incident weaken our negotiating position in attempting to protect American citizens abroad.

D. The federal government's limitation on employment of non-citizens in the competitive civil service is further supported by the consistent practice of our government and thus has that warrant conferred by history and long usage. Speaking of the challenged federal power to create a national bank, Chief Justice Marshall put this point well (*McCulloch* v. *Maryland*, 4 Wheat. 316, 401):

> It has been truly said that, this can scarcely be considered an open question, entirely unprejudiced by the former proceedings of the nation respecting it. * * *
>
> It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.

Since Chief Justice Marshall's observation, this Court has repeatedly given weight to historical practice in resolving constitutional issues. *E.g.*, *McGautha* v. *California*, 402 U.S. 183, 203; *Walz* v. *Tax Comm'n*, 397 U.S. 664, 677-680.

From the beginning of our history Congress has emphasized allegiance, which is the core of citizenship, as a qualification for federal employment. Thus,

the first statute enacted by Congress required all officers of the United States to take an oath to support the Constitution (1 Stat. 24, as amended. 5 U.S.C. 3331). When Congress legislated in 1883 about federal employment by establishing the present civil service, the legislative history shows that Congress intended and assumed that citizenship could be made a requirement for employment. The first Civil Service Rules, promulgated by President Arthur in 1883, required a statement by the applicant of his citizenship, and the Commission's first report to Congress in 1884 made it clear that citizenship was a necessary qualification. Thus Congress and the President have intended that the competitive civil service ordinarily be confined to citizens, and have known that it was so confined, from the inception of the system almost a century ago.

E. The rationality of a citizenship requirement for federal employment can hardly be doubted. Citizenship is based upon the concept of allegiance. If allegiance continues to be a meaningful concept in our law as well as in our national life, Congress and the President, for a variety of reasons, may properly require citizenship for federal employment.

All western nations impose a similar requirement for governmental employment, and, though we have made no comprehensive survey of the world, it seems probable that almost every nation follows a similar practice. This fact alone makes it difficult to say that the requirement is irrational.

There are intensely practical reasons for the requirement. Allegiance, shown by citizenship, may certainly be made a qualification for very many types of federal jobs (cf. *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 647-649), particularly in view of the diverse sensitive responsibilities of the federal government concerning national defense, foreign relations, and other matters. Also, Congress may justifiably choose to coordinate the exercise of its powers concerning immigration and the national economy and the general welfare and use the federal payroll to serve domestic social policies by favoring employment of citizens. Finally, as we show below (see pp. 66-71, *infra*), there are substantial administrative difficulties in attempting to implement a citizenship requirement on a more refined basis.

These practical considerations aside, citizenship requirement reflects symbolic reasons of great importance to the cohesion of our political community. As this Court has stated, "[c]itizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry." *Afroyim* v. *Rusk*, 387 U.S. 253, 268. "This Government was born of its citizens, it maintains itself in a continuing relationship with them * * *." *Perez* v. *Brownell*, 356 U.S. 44, 64 (Warren, C.J., dissenting). "[T]he citizens themselves are sovereign * * *." *Id.* at 65.

It is understandable, in this regard, that most persons, like most nations, might believe that the permanent civil service of their nation should be staffed

by persons who owe the nation allegiance, either by birth or by their decision to be naturalized. Such symbolic factors are important in national life and are not to be denigrated merely because they may not be demonstrably "rational" in a narrow, quantitative, or utilitarian sense.

F. The undoubted existence of a plenary power, rooted in the constitutional prerogatives of the Congress and the President, means that this case is not comparable to cases in which state laws with respect to aliens have been held to violate the equal protection clause of the Fourteenth Amendment. See *Graham* v. *Richardson*, 403 U.S. 365; *Sugarman* v. *Dougall*, 413 U.S. 634; *In re Griffiths*, 413 U.S. 717.

In weighing the concept of equal protection against federal power, it should also be noted that the Civil Service Commission regulation in question places a relatively minor burden upon aliens. They are generally disqualified for the federal competitive civil service, but not for the overwhelming majority of jobs in the American economy. In most cases, the burden of disqualification is, moreover, only a temporary one, if the alien wishes it so. Unlike race or sex, alienage is a category that the individual may leave. In this country, an alien lawfully admitted for permanent residence is eligible for naturalization after five years (three if married to a citizen). The temporary nature of the disqualification is emphasized by the fact that each of the respondents in this case

has now resided in the United States long enough to be eligible for citizenship and hence for the employment sought. Indeed, two of the plaintiffs were apparently eligible at the time they filed this lawsuit, respondent Francene Lum now having lived in this country 28 years and plaintiff Anna Yu nine years, though neither had become a citizen.

G. Nor does the Civil Service regulation offend the conscience. It is the rule, not only historically in America, but contemporaneously throughout the world.

A practice of government so rooted in the combined constitutional powers of the Congress and the President, in history and usage, and in practical considerations that commend themselves to perhaps all civilized nations ought not be struck down by the analytically sterile and simplistic observation that alienage is a "suspect" classification and that any rule with respect to it requires justification by a compelling governmental interest. That formulation, in this context, takes no account of almost all of the relevant constitutional factors.

Given the relevant considerations, application of equal protection principles requires a far more sophisticated analysis than the court of appeals provided. Its sweeping conceptualism overlooks the complexities in the relationship of aliens to the nation (as opposed to a state) which this Court stressed in *Harisiades*, *supra*, 342 U.S. at 585-586, in which, by

perpetuating "a dual status as an American inhabitant but foreign citizen," an alien "may claim protection against our Government unavailable to the citizen," "retains immunities from burdens which the citizen must shoulder," and "leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect."

The Constitution may be color-blind; as regards the federal government, however, it is not and never has been blind to the difference between citizenship and alienage, or allegiance and non-allegiance.

H. The Commission's regulation is not impermissibly broad in scope. A number of different lines might have been drawn concerning either the categories of aliens eligible for civil service employment, or the departments or positions for which they might be ineligible. That the regulation applies broadly, however, is no more a ground for invalidating it than was the breadth of the applicability of restrictions on political activity of federal employees recently sustained in *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548.

In their challenge to the application of the Commission's regulation to aliens in their position and to the jobs that they seek, respondents are ultimately asking this Court to "strike a different balance" (*id.* at 564) than the one struck by Congress and the Executive Branch. That balance, however, "is sustainable by the obviously important interests sought

to be served by the [challenged] limitations * * *." *Ibid.*

Recognizing the unique legal status of aliens, who derive legal protection from both international law and domestic law, Congress has made varied judgments in extending the benefits of citizens to aliens throughout our history. The requirements challenged here are thus part of a longstanding and widespread pattern of federal differentiation between citizens and aliens. A holding that such requirements are beyond the federal government's power or are overly broad would threaten the validity of hundreds of provisions of the United States Code.

I. The background and legislative history of the Pendleton Civil Service Act of 1883 (22 Stat. 403), which established the present Civil Service Commission, demonstrate that Congress intended to authorize the Commission to limit employment of non-citizens in the civil service even though the civil service laws themselves do not contain any explicit citizenship requirement. The original rules of the Commission adopted by President Arthur in 1883 limited entrance to the competitive civil service to citizens, and a similar citizenship requirement has been part of the Commission's regulations ever since.

Congress has been well-aware of the Commission's limitations on employment of non-citizens in the civil service. Indeed, Congress has since 1938 included in appropriation acts broad statutory prohibitions on the payment of funds to non-citizen employees of the

United States. The court of appeals correctly found that the regulations were within the authority granted by Congress.

J. As this Court held in *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, and *Morton* v. *Mancari*, No. 72-362, decided June 17, 1974, the term "national origin," as used in executive orders and statutes prohibiting discrimination on that basis, does not include alienage, and, as the court of appeals properly held, a requirement of United States citizenship is not inconsistent with such prohibitions.

I. GENERAL LIMITATION OF THE EMPLOYMENT OF ALIENS IN THE FEDERAL COMPETITIVE CIVIL SERVICE IS NOT BEYOND THE CONSTITUTIONAL POWER OF THE FEDERAL GOVERNMENT.

In holding that the Civil Service regulation generally limiting employment in the federal competitive civil service to citizens and others owing permanent allegiance to the United States was authorized by Congress and the President but was unconstitutional, the court of appeals has held in effect that such a limitation is totally beyond the constitutional powers of the United States—Congress and the President combined. That conclusion was reached—erroneously, we submit—as a result of an inappropriate application of standards pertaining to the constitutionality of state laws relating to alienage and of a failure to consider constitutionally relevant factors such as the unique legal status of aliens, the explicit constitutional pref-

erences for citizens, the constitutional prerogatives of Congress and the President, the distinctive responsibilities of the federal civil service, the long history of the challenged limitation, and the apparently universal similar practices of other nations.

A. Equal Protection Principles Do Not Control This Case.

It is now settled that the equal protection principle, when applicable, restricts federal governmental action by virtue of the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497; *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 533, n.5. But that proposition does not resolve this case. The threshhold question always is whether the particular action involved is one to which equal protection analysis is relevant.

Obviously enough, there are areas subject to federal regulation with respect to which no one would claim that equal protection principles apply. These include instances where the Constitution itself confers plenary power upon Congress or the President. Thus, no treaty could be challenged on the ground that it discriminates against one group of foreign nationals resident here, or against citizens. Nor could a congressional appropriation in favor of residents of the District of Columbia, or of a Territory, be attacked as denying equal treatment to other citizens of the United States. So, also, aliens cannot complain because, unlike citizens, they are made subject to deportation. Our primary submission is that the decision to limit employment of noncitizens in the federal competitive civil service is likewise a matter beyond the reach of the equal protection principle.

1. *The Legal Status Of Aliens Is Unique.*

Aliens in this country, like Indians, occupy a "unique legal status • • • of long standing," with respect to federal employment and other matters. *Morton* v. *Mancari*, No. 73-362, decided June 17, 1974, slip op. pp. 16, 19.

Unlike such characteristics as race and national origin, alienage is neither a highly visible nor an "immutable" or "unalterable" trait (cf. *Johnson* v. *Robison*, 415 U.S. 361, 375, n. 14); *Lindsey* v. *Normet*, 405 U.S. 56, 73), but is a legal condition imposed by domestic and international law, denoting a person's lack of permanent attachment to the people and to the government of a nation.[12] The condition

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[12] The term "alien" is defined in the Immigration and Nationality Act of 1952 as "any person not a citizen or national of the United States." 8 U.S.C. 1101(a)(3). "[N]ational of the United States" means "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. 1101(a)(22). See p. 4, *supra*, n. 1. Under international law, nationality involves a firm and permanent bond with a body politic. As was stated by the International Court of Justice in the *Nottebohm Case* (*Lichtenstein* v. *Guatemala*) [1955] I.C.J. Rep. 4, 23:

> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, inter-

is subject to change in most cases by action of the alien. Upon acquiring citizenship, the alien's former status becomes immaterial for most purposes. See *Schneider* v. *Rusk*, 377 U.S. 163.

An alien may enjoy "such advantages as accrue from residence here without renouncing his foreign allegiance or formally acknowledging adherence to the Constitution * * *." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 585. The Court in *Harisiades* described the a unique legal status of aliens as follows (*id.* at 585-586; footnotes omitted):

> So long as one thus perpetuates a dual status as an American inhabitant but foreign citizen, he may derive advantages from two sources of law—American and international. He may claim protection against our Government unavailable to the citizen. As an alien he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf, a patronage often of considerable value. * * *
>
> The alien retains immunities from burdens which the citizen must shoulder. By withholding

ests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-a-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.

> his allegiance from the United States, he leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect. In deference to it certain dispensations from conscription for any military service have been granted foreign nationals. They cannot, consistently with our international commitments, be compelled "to take part in the operations of war directed against their own country." In addition to such general immunities they may enjoy particular treaty privileges.[13]

An alien is, of course, a "person" within the meaning of the Fifth Amendment (*e.g.*, *Wong Wing* v. *United States*, 163 U.S. 228, 238; cf. *Russian Fleet* v. *United States*, 282 U.S. 481, 489) and the Fourteenth Amendment (*e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369; *Truax* v. *Raich*, 239 U.S. 33, 39; *Takahashi* v. *Fish Comm'n*, 334 U.S. 410, 419), but this does not mean that all legal distinctions between citizens and aliens are constitutionally barred. The Constitution itself grants numerous rights to the former that are withheld from the latter. See *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 651-652 (Rehnquist, J., dissenting).[14] And, in general, "[u]nder

[13] Cf. *Hines* v. *Davidowitz*, 312 U.S. 52, 64-65. See generally Roth, *The Minimum Standard of International Law Applied to Aliens* (1949).

[14] Indeed, because they were apprehensive about the possibility of alien influence in the affairs of the national government, the Framers wrote into the Constitution explicit provisions concerning the citizenship of the President (Art.

our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 586 (footnotes omitted).

2. *The Constitution Authorizes Preferred Treatment For Citizens.*

"Citizenship is no light trifle * * *." *Afroyim* v. *Rusk*, *supra*, 387 U.S. at 267. It "occupies a preferred position in our written Constitution * * *." *Perez* v. *Brownell*, *supra*, 356 U.S. at 84 (Douglas, J., dissenting). "Citizenship *is* man's basic right for it is nothing less than the right to have rights." *Id.* at 64 (Warren, C.J., dissenting; emphasis in original). It, "alone, assures him the full enjoyment of the precious rights conferred by our Constitution." *Id.* at 78.

We have just noted provisions of the original Constitution which restrict the highest federal offices to citizens (p. 27, *supra*, n.14). Those are not special exceptions to a general rule that places citizens and aliens constitutionally on the same footing. On the contrary, Section 1 of the Fourteenth Amendment itself—the fountainhead of the equal protection principle—demonstrates that there is a fundamental constitutional difference between citizens and aliens

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II, Sec. 1, cl. 5: natural born citizen), Senators (Art. I, Sec. 3, cl. 3; citizen for nine years), and members of the House of Representatives (Art. I, Sec. 2, cl. 2; citizen for seven years). See generally 2 Farrand, *The Records of the Federal Convention of 1787*, at 235, *et seq.*, 268 *et seq.* (1966 rev. ed.).

which, in many respects, justifies disparate treatment.[15]

Indeed, as Mr. Justice Rehnquist pointed out, dissenting, in *Sugarman*, 413 U. S. at 652, the Amendment explicitly distinguishes between the special privileges of "citizens of the United States" and immunities appertaining to all "persons." The states may abridge neither, but that does not eliminate the difference between the two categories of rights. Nor, of course, has this Court, in *Sugarman* or any other case, purported to revise the constitutional understanding. What the Privileges and Immunities Clause necessarily implies is that certain rights belong only to citizens, and it would make nonsense of the Amendment to hold that those citizenship rights must be shared with aliens by virtue of the Due Process and Equal Protection Clauses. See *Bradwell* v. *The State*, 16 Wall. 130, 138.[16] See also *Slaughter-House Cases*, 16 Wall. 36, 74.

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[15] See also the Fifteenth Amendment which, in terms, protects only "citizens of the United States," and Section 2 of the Fourteenth Amendment, which imposes a reapportionment penalty on states that restrict the elective franchise only when "citizens of the United States" (otherwise qualified by age, gender, residence and absence of criminal conviction) are adversely affected.

[16] In *Bradwell*, the Court commented (16 Wall. at 138):

> In regard to that amendment counsel for the plaintiff in this court truly says that there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the fourteenth amendment to prohibit a State from abridging them * * *.

Certainly, that was the view of those who framed the Fourteenth Amendment. The Thirty-Ninth Congress expressly confined the benefits of the Civil Rights Act of 1866 to citizens. 14 Stat. 27.[17] And, in succeeding years, the most radical legislators of the Reconstruction era, implementing, as they thought, the Privileges and Immunities Clause, continued to define rights enjoyed by citizens alone. See, *e.g.*, Enforcement Act of 1870, 16 Stat. 140 (except only secs. 16 and 17, 16 Stat. 144); Civil Rights Act of March 1, 1875, 18 Stat. 335. It never occurred to these contemporaries of the Fourteenth Amendment, that the equal protection principle compelled them to include aliens when they declared the "civil rights of citizens." To be sure, they felt *free* to extend the benefit to aliens, as Section 17 of the Enforcement Act of 1870 (16 Stat. 144, as amended, 18 U.S.C. 242) sufficiently attests.[18] See also Section

[17] While the Civil Rights Act of 1866 was enacted by the very same members who framed the Fourteenth Amendment, it was of course premised on the *Thirteenth* Amendment, not the Fourteenth (which was not ratified until 1868). But, as this Court has repeatedly noted, the 1866 Act was an attempt to achieve the same end and was expressly re-enacted as Fourteenth Amendment legislation by Section 18 of the Enforcement Act of 1870, 16 Stat. at 144. See, *e.g.*, *Civil Rights Cases*, 109 U.S. 3, 22; *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369; *Buchanan* v. *Warley*, 245 U.S. 60, 78-79; *Oyama* v. *California*, 332 U.S. 633, 640, 646; *Shelley* v. *Kraemer*, 334 U.S. 1, 10-11; *Hurd* v. *Hodge*, 334 U.S. 24, 32-33; *Takahashi* v. *Fish Comm'n*, 334 U.S. 410, 419-420.

[18] The original provision, like its current successor (18 U.S.C. 242), *expressly* protects *aliens* only from discriminatory "punishment, pains or penalties." Presumably, however, aliens were meant to be embraced by the term "inhabitant of any State or Territory" and, therefore, also to enjoy the protection of the criminal law with respect to the other rights mentioned earlier in the section. See *United States* v. *Classic*, 313 U.S. 299, 326-328, n. 10. Originally, these were restricted to what is encompassed by the following language in Section 16 of the 1870 Act (now 42 U.S.C. 1981): "the same right * * * to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens" and the right to be "subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other." It was only in 1874 that the Revisers, apparently going beyond their mandate, expanded the provision so as to include all rights embraced by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as substantive "federal rights." See *United States* v. *Price*, 383 U.S. 787, 802-803; *Screws* v. *United States*, 325 U.S. 91, 98-100 (opinion of Douglas, J.); *id.* at 120-125 (opinion of Rutledge, J.). For a convenient tabular history of 18 U.S.C. 242, including all earlier texts, see the Appendix to the opinion of Mr. Justice Frankfurter in *United States* v. *Williams*, 341 U.S. 70, 83.

16 of the 1870 Act[19] and the Ku Klux Act of April

[19] As originally enacted, this section contained two distinct provisions. The second, which has not survived, prohibited the states from imposing any greater "tax or charge" on one group of incoming aliens than was imposed on aliens immigrating from other countries. More important is the first provision which, in all material respects, is now codified as 42 U.S.C. 1981. See p. 30, *supra*, n. 18. The rights enumerated—being *some* of those declared for citizens only by Section 1 of the Civil Rights of 1866—were extended to "all persons within the jurisdiction of the United States." This ambiguous term has been held to include at least resident aliens not enjoying diplomatic immunity. *Yick Wo* v. *Hopkins*, *supra*, 118 U.S. at 369; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 695-696; *Takahashi* v. *Fish Comm'n.*, *supra*, 334 U.S. at 419.

20, 1871, 17 Stat. 13.[20] But that was viewed as a matter of legislative discretion, not constitutional imperative, and it was done selectively. Thus, much of what remains of these Reconstruction measures still excludes aliens from protective coverage. See 18 U.S.C. 241 (sustained and applied from *Ex parte Yarbrough*, 110 U.S. 651, in 1884 through *Anderson*

[20] In its central provisions, the 1871 Act apparently extended its protection to aliens. Section 1 (the predecessor of 42 U.S.C. 1983 and 28 U.S.C. 1343(3)) afforded civil remedies to "any person within the jurisdiction of the United States" for any deprivation, under color of law, of rights "secured by the Constitution." As with 18 U.S.C. 242 (see p. 30, *supra*, n. 18), the 1874 Revision expanded the rights covered without changing the beneficiaries. See *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 543, n. 7. Section 2 of the Act, in its most important part, offered both criminal protection and civil relief to "any person or any class of persons" whose right to "equal protection of the laws" or whose "equal privileges or immunities under the laws" were threatened by a conspiracy. In the Revised Statutes, the criminal and civil provisions—otherwise substantively unchanged—were severed, and the first was struck down as unconstitutional in *United States* v. *Harris*, 106 U.S. 629. In confirming that ruling in *Baldwin* v. *Franks*, 120 U.S. 678, 684-690, the Court expressly assumed that the section was intended to protect aliens as well as citizens. The civil counterpart, which survives as 42 U.S.C. 1985(3), was recently construed in *Griffin* v. *Breckenridge*, 403 U.S. 88. Finally, Section 3 of the 1871 Act, in part, authorizes the President to use armed force to suppress a conspiracy that the state is unable or unwilling to control and that so hinders the execution of law that "any portion or class of the people of such State" is deprived of any right "named in the Constitution and secured by this act." Again, the 1874 Revision arguably expanded the rights protected by substituting, for the last phrase of the original, "secured by law." The provision is now 10 U.S.C. 333. See *Alabama* v. *United States*, 373 U.S. 545.

v. *United States*, No. 73-346, decided June 3, 1974); 18 U.S.C. 243 (upheld in *Ex parte Virginia*, 100 U.S. 339); 42 U.S.C. 1971(a)(1) (applied in *Louisiana* v. *United States*, 380 U.S. 145); 42 U.S.C. 1982 (applied in *Hurd* v. *Hodge*, 334 U.S. 24, and more recently construed in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409).[21]

We need not inquire whether the legislators of the Reconstruction decade always drew the right lines. It is familiar history that this Court struck down much of their work as straying beyond constitutional boundaries and, until very recently, gave a very restricted reading to what survived. It may well be that the Congress of that day indulged too expansive a notion of "privileges and immunities" of national citizenship—apparently deemed synonymous with "civil rights" [22]—or that it wrongly assumed power to add new privileges instead of merely protecting those that the Constitution itself established. We do not rely on any such congressional claim. But we are entitled to draw this much at least from legislation so close to the Fourteenth Amendment: (1) that there is a discrete category of privileges and im-

[21] There are also provisions which, although reaching both categories of civil rights, expressly recognize that some are confined to citizens while others are enjoyed by all "persons." *E.g.*, 28 U.S.C. 1343(3) (recently construed in *Lynch* v. *Household Finance Corp.*, *supra*; 28 U.S.C. 1443(1) (applied in *Georgia* v. *Rachel*, 384 U.S. 780); 42 U.S.C. 1983 (recently construed in *Adickes* v. *Kress & Co.*, 398 U.S. 144); 42 U.S.C. 1985(3) (applied in *Griffin* v. *Breckenridge*, *supra*).

[22] See *Oregon* v. *Mitchell*, 400 U.S. 112, 163-164 (opinion of Harlan, J.).

munities of national citizenship; (2) that neither the Equal Protection Clause of the Fourteenth Amendment, nor any comparable principle operating against the federal government, *requires* that such privileges be shared with aliens; (3) but that Congress *may*, if it chooses, extend those privileges to aliens.

The first two propositions are self-evident. This Court, however conservative in confining the list, has consistently acknowledged that privileges of national citizenship exist. See *Slaughter-House Cases*, *supra*, 16 Wall. at 74; *Bradwell* v. *The State*, *supra*, 16 Wall. at 138; *United States* v. *Reese*, 92 U.S. 214, 217-218; *United States* v. *Cruikshank*, 92 U.S. 542, 552, 555-556; *In re Kemmler*, 136 U.S. 436, 448; *Twining* v. *New Jersey*, 211 U.S. 78, 93-99; *Hague* v. *C.I.O.*, 307 U.S. 496, 513-514 (opinion of Roberts, J.); *id.* at 519-522 (opinion of Stone, J.); *Madden* v. *Kentucky*, 309 U.S. 83 90-93; *Griffin* v. *Breckenridge*, *supra*, 403 U.S. at 106. And it has at least ~~v. *Kentucky*, 309 U.S. 83, 90-93; *Griffin* v. *Brecken-*~~ impliedly confirmed the principle that, constitutionally, they may be withheld from aliens. See *Baldwin* v. *Franks*, 120 U.S. 678, 690-692. Our last proposition, however, is not so obvious. Indeed, it may properly be asked how a *citizenship* privilege which, by definition, is conferred on citizens alone because of the special relationship between them and their government, can be shared with non-citizens. Is not the consequence to "demote" the right in some sense? [23]

[23] It is, of course, established doctrine that Congress may protect privileges of national citizenship, unlike most other

And, if so, would that not violate the settled principle that Congress cannot strip away the protective mantle with which the Constitution itself clothes citizens of the United States? See *Afroyim* v. *Rusk*, *supra*, 387 U.S. at 267; *United States* v. *Wong Kim Ark*, *supra*, 169 U.S. at 703; *Osborn* v. *United States Bank*, 9 Wheat. 738, 827.

The answer, we submit, is this: when Congress shares with aliens a privilege that the Constitution grants to citizens by virtue of their citizenship, the latter continue to enjoy it as a privilege of national citizenship with all the special attributes of that title, while those on whom it is conferred as a matter of legislative discretion hold it precariously with whatever protection Congress has surrounded it, subject to constitutional limitations.[24] In sum, with respect

rights, against wholly private interference. *E.g.*, *Twining* v. *New Jersey*, *supra*, 211 U.S. at 97-98. Moreover, most citizenship rights—unlike those secured by the Due Process or Equal Protection Clauses—are positive, if not absolute, and cannot be abridged by state action, no matter how rational or nondiscriminatory that interference may be.

[24] Constitutional limitations may be of three kinds: (1) those few instances in which the Constitution itself expressly reserves the privilege of citizens (*e.g.*, eligibility for the Presidency); (2) those very rare cases in which conferring the privilege on aliens would invade state prerogatives (*e.g.*, the right to acquire state citizenship by residence, without the state's consent, granted to national citizens by the Citizenship Clause of the Fourteenth Amendment); and (3) perhaps some instances in which the privilege is not related to one of the plenary congressional powers. We may doubt whether any case will fall within our last category, especially considering

to aliens, the privilege is enjoyed only by a defeasible congressional title and may be, even for the time being, less generously protected, whether because Congress cannot, or prefers not to, guard it as firmly as it does in the case of citizens.[25]

The remaining question is whether eligibility for federal employment properly can be deemed one of the privileges of national citizenship. We recognize that the Court has kept the list short, albeit the concern which informed that reluctance—a fear that state power would be too much confined by an expansive definition of citizenship rights (see the opinion of Mr. Justice Stone in *Hague* v. *C.I.O.*, 307 U.S. 496, 520-521, n. 1)—is, of course, irrelevant here. But the test, consistently followed, seems to include our case: whether the right is one of those that "owe their existence to the Federal government, its National character, its Constitution, or its laws."

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the exclusive national authority with respect to aliens under the Naturalization Clause and the foreign relations power.

[25] It will be a rare case when Congress is constitutionally barred from according the same measure of protection to aliens. See p. 35, *supra*, n. 24. But, as a matter of legislative discretion, instances are not lacking. Indeed, at present, the general criminal law that protects citizenship rights against private conspiracies (18 U.S.C. 241) operates only in favor of citizens (see *Baldwin* v. *Franks*, *supra*) and, unless amended, would not prohibit interference with an alien who had been extended such a right. Thus, assuming that eligibility to share in the public domain is a privilege of national citizenship (*United States* v. *Waddell*, 112 U.S. 76), Section 241 does not shield the alien homesteader, presumably even one who has filed his declaration of intent to become a citizen. See 43 U.S.C. 161, 321.

Slaughter-House Cases, *supra*, 16 Wall. at 79. Otherwise stated, the criterion is whether the privilege reasonably can be said to inhere in that special relationship with the national government which is traditionally characteristic of citizenship. See *Hague* v. *C.I.O.*, *supra*, 307 U.S. at 520 (opinion of Stone, J.). See also *Twining* v. *New Jersey*, *supra*, 211 U.S. at 97.[26] So judged, it would be difficult to conclude

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[26] A comprehensive list of privileges and immunities of national citizenship, culled from this Court's opinions, is to be found in *United States* v. *Moore*, 129 Fed. 630, 633 (C.C. N.D. Ala.), cited with approval in *United States* v. *Guest*, 383 U.S. 745, 759. The court there said:

> Among th rights and privileges secured to citizens of the United States, expressly or impliedly, * * * are the right to vote for presidential electors and members of Congress; the right to hold and seek office under the federal government; the right to petition Congress for redress of grievances, and to freely print, speak, or write one's sentiments, being responsible for the abuse thereof, concerning any right or matter committed to the federal government; the right, of his own volition, to become a citizen of any state of the Union by bona fide residence therein, with the same rights as other citizens of that state; the right of every judicial or executive officer or other person engaged in the service, or kept in the custody of the United States, in the course of the administration of justice, to be protected from lawless violence; the right to the privileges of the writ of habeas corpus; the right to go to and return from the seat of government; the right to resort to the courts of the United States; the right to communicate to any executive officer any information which the citizen has of the commission of an offense against the laws; the right to engage in interstate commerce; the right to enter a homestead upon the public domain, and live on it for the purpose of perfecting the entry; the right to claim the protection of the

that eligibility to hold a job with the government of the United States is not properly viewed as a privilege of national citizenship.

It is not irrelevant that other nations, like our own, restrict most government jobs to their own citizens (see *infra*, pp. 54-58). That is, at least in part, a recognition that working for the government is a privilege properly reserved to those who share a common allegiance. But, more fundamentally, in a republic the government is the delegate of the citizenry. The prime right of the citizen is to participate, directly or indirectly, in his own governance. That is why the right to elect federal officers is deemed a privilege of national citizenship. *A fortiori*, one would suppose, the more direct participation in government which those who constitute it enjoy ought to be so characterized.

This submission is in no way inconsistent with the Court's previous rulings that the states cannot prohibit aliens from private employment (*Truax* v. *Raich*, *supra*) or exclude them, as such, from state jobs (*Sugarman* v. *Dougall*, *supra*). Those relationships obviously have nothing to do with the existence

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government when on the high seas or in foreign lands, or in any place committed exclusively to federal jurisdiction; the right to be exempt from discrimination on account of race, as to equality before the law, suffrage, or service on juries; the right to pass from one state to any other for any lawful purpose; the right to be free from taxes and excises not imposed by the state on its own citizens; and the right to be free from slavery or involuntary servitude, except as a punishment for crime.

of the federal government or its national character, and the rights involved are not meaningfully associated with citizenship of the United States. But *federal* employment is. Tnis is the same distinction as that which the Court has drawn between state and federal elections. See *Ex parte Yarbrough*, *supra*; *Oregon* v. *Mitchell*, *supra*.

Nor does our argument, under this heading, depend on any suggestion that Congress or the President has power to create new privileges of national citizenship. We adhere to the settled doctrine that no branch of government can expand or contract the substantive content of the Privileges and Immunities Clause. See *United States* v. *Cruikshank*, *supra*, 92 U.S. at 550. Certainly, we do not suggest that the protection that aliens enjoy by virtue of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Due Process Clause of the Fifth can be abrogated by legislative expansion of the Privilege and Immunities Clause. On the other hand, we submit that a congressional judgment on a constitutional issue is entitled to respect as an authoritative brief laid before this Court and, further, that when that judgment is both ancient and continuing it is evidence of the understanding and probable meaning of the constitutional text in question. Accordingly, we deem it relevant that Congress has so long treated eligibility for the competitive federal civil service as a privilege of national citizenship.

That has been the Court's consistent approach. While a congressional decision to confine a privilege to citizenship has never been deemed dispositive,[27] the Court has always noticed a legislative determination as persuasive evidence. Indeed, in almost every case in which the Court has recognized a right as uniquely appertaining to national citizenship, legislation has been invoked to reach that result.[28] Thus, in *Ex parte Yarbrough*, *supra*, 110 U.S. at 655, a specific criminal statute condemned a conspiracy to prevent "any citizen" otherwise qualified from participating in congressional elections. In *United States* v. *Waddell*, 112 U.S. 76, 79, vindicating the right to

[27] Thus, the Privileges and Immunities Clause alone presumably would not justify any generalized attempt, by federal law, to confine state jobs to national citizens. The reason would be (objections under the Tenth Amendment aside) that there is no sufficient legitimate federal interest in the matter to view eligibility for state employment as a privilege of national citizenship.

[28] In none of the cases cited in the remainder of this paragraph was the Privileges and Immunities Clause of the Fourteenth Amendment directly invoked because only wholly unofficial conduct, not reached by the Clause *ex proprio vigore*, was involved. Rather, the issue was whether the right asserted was protected by the criminal provision that is now 18 U.S.C. 241, which vindicates only "any right or privilege secured * * * by the Constitution or laws of the United States" to "any citizen." At the time of the decisions invoked here, and until *United States* v. *Price*, *supra*, those rights were thought to be the same as the "privileges or immunities of citizens of the United States" secured against state interference by the Privileges and Immunities Clause of the Fourteenth Amendment. See, *e.g.*, *Twining* v. *New Jersey*, *supra*, 211 U.S. at 97.

undisturbed enjoyment of a homestead entry, the Court expressly noted that the right was "wholly dependent upon * * * [an] act of Congress" that restricted the privilege to citizens. Again, in *Logan* v. *United States*, 144 U.S. 263, 284, federal statutes were invoked to justify the conclusion that a citizen was protected against violence while in federal custody. Even *In re Quarles*, 158 U.S. 532, 537, involving the right of a citizen to inform concerning violations of the internal revenue laws without interference, turned in part on statutes defining the duties of deputy marshals. And, conversely, when the Court declined to treat an asserted right as protected by the Privileges and Immunities Clause, it pointed to laws that had permitted aliens to share it. *E.g.*, *Bradwell* v. *The State*, *supra*, 16 Wall. at 139, quoted in *In re Griffiths*, *supra*, 413 U.S. at 719 (practice of law); *Minor* v. *Happersett*, 21 Wall. 162, 177 (right to vote).

In sum, the Fourteenth Amendment teaches that equal protection analysis has no place when we are dealing with rights that can properly be characterized as privileges of national citizenship and that congressional action is relevant to that characterization. The result can be no different because here the equal protection claim is advanced under the Fifth, rather than the Fourteenth Amendment. After all, it was only under compulsion of Fourteenth Amendment decisions that the Court imported the equal protection principle into the Fifth. See *Bolling* v. *Sharpe*, 347 U.S. 497; *Currin* v. *Wallace*, 306 U.S. 1, 14. The

critical test in both cases must be, not whether there are compelling reasons for excluding aliens, but, rather, whether the privilege is one that reasonably can be said to appertain to that special relationship which exists between citizens and their national government. We submit that eligibility for federal employment is such a privilege which Congress is free to reserve for citizens of the United States.

3. *Congress Has Broad Constitutional Power "To Fix The Conditions Under Which Aliens Are To Be Permitted To Enter And Remain In This Country."*

This Court has frequently recognized that Congress has broad power to deal with the special problems of aliens, as a part of its plenary power over immigration and naturalization. Article I, Sec. 8, cl. 4, of the Constitution explicitly vests in Congress the power to establish uniform rules of naturalization. Moreover, this Court has long held that the power of the federal government to admit and exclude aliens is also an inherent, essential incident of the national sovereignty established by the Constitution. See, *e.g.*, *Chinese Exclusion Case*, 130 U.S. 581, 603-604; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705, 713; *Galvan* v. *Press*, 347 U.S. 522, 530-532; *Kleindienst* v. *Mandel*, 408 U.S. 753, 766. Protraction of an alien's "ambiguous status within the country is not his right but is a matter of permission and tolerance," subject to "[t]he Government's power to terminate its hospitality * * *." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 586-587.

The benefits and burdens attaching to the status of aliens affect whether immigration to this country will be more or less attractive to citizens of other countries (cf. 2 Farrand, *The Records of the Federal Convention of 1787*, at 235 (1966 rev. ed.)), and the determination whether and to what extent immigration of aliens is to be encouraged or discouraged is a matter "belonging to the political branch of the Government * * *." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 596 (Frankfurter, J., concurring). Accordingly, encompassed within the "plenary power to make rules for the admission of aliens" (*Boutilier* v. *Immigration Service*, 387 U.S. 118, 123) is comparably broad power "to fix the conditions under which aliens are to be permitted to enter and remain in this country." *Flemming* v. *Nestor*, 363 U.S. 603, 616; accord, *Takahashi* v. *Fish Comm'n*, *supra*, 334 U.S. at 419.

By vesting the Congress with the power to establish rules of naturalization, the Framers of the Constitution authorized Congress, in Madison's words, to fix different conditions for "enjoying different privileges of citizenship * * *." 2 Farrand, *supra*, at 235. See also *id.* at 268 (remarks of Hamilton). In consequence, the alien in the United States "has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Johnson* v. *Eisentrager*, 339 U.S. 763, 770.

Thus, while Congress has frequently extended

rights or imposed burdens on "persons" or "individuals" without distinction between citizen and alien,[29] the United States Code contains literally hundreds of provisions reflecting precisely drawn distinctions between citizens and some or all aliens in the provision of both benefits and burdens. See Appendix, *infra*. As a result, while it may be true in a general sense that "[r]esident aliens, like citizens, pay taxes, support the economy, serve in the armed forces, and contribute in myriad other ways to our society" (*In re Griffiths*, *supra*, 413 U.S. at 722), even in those activities aliens have in some circumstances[30] been exempted by Congress from such obligations of citizenship.[31]

Similarly, in determining which of the "different privilges of Citizenship • • •" (2 Farrand, *supra*, at 235) aliens should have, Congress has drawn lines throughout our history, but not always the same lines. Congress has for some purposes extended privileges

[29] *E.g.*, 42 U.S.C. 402(a) (retirement benefits); 42 U.S.C. 1983 (protection of civil rights).

[30] *E.g.*, 50 U.S.C. App. 454(a) (liability for military training and service limited to citizens and to aliens admitted for permanent residence); 16 U.S.C. 781 (prohibition against certain fishing beyond state territorial limits applies only to citizens and persons owing duty of obedience to laws of the United States); cf. 19 U.S.C. 1586(e) (prohibition against unloading vessels within specified off-shore waters applicable only to citizens).

[31] "The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation." *Trop* v. *Dulles*, 356 U.S. 86, 92.

only to citizens of the United States,[32] while for other purposes it has also extended privileges to aliens who have been "lawfully admitted for permanent residence" [33] or who have declared their intention to become citizens.[34]

At times, Congress has made explicit the foreign relations dimensions of legislation concerning aliens, as where it has conditioned the right of an alien to exercise certain privileges of a citizen upon reciprocal treatment of United States citizens in the alien's own country,[35] or where it specifically makes refugees from a particular country eligible for benefits to which they would not otherwise be entitled.[36]

Although the details vary, the dominant theme of the conditions imposed by Congress on aliens' eligibility for benefits or privileges available to citizens is that they demonstrate some substantial and en-

[32] *E.g.*, 7 U.S.C. 1941(1), 1961(b)(1) (Section 1961(b)(1) held unconstitutional in *Gomez* v. *Butz*, No. 326-73 (D.P.R.), decided May 29, 1974, *sub nom. Ramos* v. *United States Civil Service Commission*, appeal docketed, No. 74-216); 7 U.S.C. 1158(c); 10 U.S.C. 8285(a)(1); 12 U.S.C. 1427(a); 25 U.S.C. 399; 28 U.S.C. 1861, 1865(b)(1) (held constitutional in *Perkins* v. *Smith*, 370 F. Supp. 134 (D. Md.), appeal docketed, No. 73-1915); 28 U.S.C. 1872; 42 U.S.C. 1971(a), 1973, 1982; 43 U.S.C. 145; 47 U.S.C. 303(1), 310(a)(1); cf. 69 Stat. 699, as amended, 1 D.C. Code 1102(2).

[33] *E.g.*, 10 U.S.C. 8253; 42 U.S.C. 428(a); 47 U.S.C. (Supp. II) 310(a).

[34] *E.g.*, 10 U.S.C. 311(a); 30 U.S.C. 22; 43 U.S.C. 161; 47 U.S.C. (Supp. II) 310(a); 48 U.S.C. 1501, *et seq.*

[35] *E.g.*, 10 U.S.C. 7435(a); 15 U.S.C. 1126(b); 26 U.S.C. 901(c); 28 U.S.C. 2502; 42 U.S.C. 402(t)(2); 46 U.S.C. 785.

[36] *E.g.*, 42 U.S.C. 2713, 2742, 2949(3).

during connection with the United States. Aliens who satisfy that requirement have in the main been generously provided for and treated by Congress as if they had already achieved citizenship. Indeed, the solicitude with which Congress has generally treated aliens demonstrates that, despite their temporary inability to vote in most jurisdictions,[37] it would be inaccurate to characterize them as being in a position of "political powerlessness." *Johnson* v. *Robison*, *supra*, 415 U.S. at 375, n. 14.

4. *As Chief Executive And Commander-In-Chief, The President Has Broad Inherent Powers Pertaining To Matters Affecting Foreign Relations And The Unique Responsibilities Of The Executive Branch.*

The executive order authorizing the Civil Service Commission to use "citizenship" as a qualification for employment in the federal competitive civil service was promulgated by the President, not only pursuant to authority vested in him by Congress under the civil service laws, but also "[b]y virtue of the authority vested in me by the Constitution * * * and as President of the United States * * *." Executive Order No. 10577, *supra*, p. 3.

[37] In fiscal year 1972, more than 100,000 aliens became naturalized citizens. Annual Report of the Attorney General 196 (1972). Many resident aliens at any given time are potential citizens and are frequently close relatives of voters, so that their interests cannot lightly be disregarded by members of Congress. The large volume of private bills benefitting aliens enacted each year (*e.g.*, 86 Stat. 1527-1568, *passim*) demonstrates that they are not lacking in meaningful political power.

Pursuant to both the explicit provisions of the Constitution and the inherent incidents of national sovereignty, the federal government, unlike a state, has important powers and responsibilities concerning foreign relations and national defense. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-318. The exercise of these powers of the federal government is peculiarly the inherent responsibility of the President, not necessarily requiring as its basis an act of Congress. *Id.* at 319-320; cf. *The Flying Fish* (*Little* v. *Barreme*), 2 Cranch 170, 177. See also *In re Debs*, 158 U.S. 564, 582, 599; *New York Times Co.* v. *United States*, 403 U.S. 713, 727-730 (Stewart, J., concurring); *id.* at 741-742 (Marshall, J., concurring); *id.* at 756-758 (Harlan, J., dissenting). In the exercise of these powers, the President may take action concerning aliens through treaties (*e.g.*, *Zschernig* v. *Miller*, 389 U.S. 429) or by other means. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (power to exclude aliens is "inherent in the executive"). See generally Henkin, *Foreign Affairs and the Constitution* 45-56 (1972).

In addition, in carrying out his inherent responsibilities as Chief Executive, as well as his explicit constitutional duty to "take Care that the Laws be faithfully executed * * *" (Article II, Sec. 3), the President has some latitude, even without authorization from Congress, not only to take action concerning aliens to satisfy the obligations of the United States

under international law,[38] but also to establish qualifications, such as allegiance to the nation, for those who would assist in the implementation of the functions of the Executive Branch.

5. *The Judicial Role In Determining The Constitutionality Of The Decision Of The Federal Government to Limit the Employment Of Aliens In The Competitive Civil Service Is Exceptionally Constricted And The Limitation Is Valid Without Regard To Its Rationality Or The Substantiality Of The Underlying Reasons.*

As this Court has repeatedly observed, federal "[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." *Galvan* v. *Press*, *supra*, 347 U.S. at 531. Such policies are "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 588-589. "[T]hat the formulation of these policies [toward aliens] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan* v. *Press*, *supra*, 347 U.S. at 531. See *Lees* v. *United States*, 150 U.S. 476, 480. Indeed, "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 589. The Court's reaffirmations of these general principles "have been legion." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-766.

[38] International law is "part of our law." *The Paquete Habana*, 175 U.S. 677, 700; see Henkin, *supra*, at 55-56.

We do not contend that the powers of Congress and the Executive Branch concerning aliens are without limit. However, where a restriction imposed by the federal government upon aliens neither contravenes any explicit prohibition of the Constitution nor otherwise "clashes with those individual liberties protected by the Bill of Rights * * *" (*United States* v. *Robel*, 389 U.S. 258, 264), the courts have no warrant to inquire into its possible justifications or its consequences.[39]

In such a case, the restriction need not be shown to be necessary to promote a compelling governmental interest nor to have a rational basis—not because arbitrariness or irrationality is to be encouraged, but because the question is essentially "political" in nature. Cf. *C. & S. Air Lines, Inc.* v. *Waterman Corp.*, 333 U.S. 103, 111.[40]

[39] We need not address here the hypothetical possibility of a provision concerning aliens which, while not implicating either the liberties protected by the Bill of Rights or other explicit Constitutional prohibitions, could be regarded as offensive to the "conscience" of the nation. As we show below, the limitation challenged here has deep historical roots in this country and is consistent with the practices of all Western nations, if not all nations (see pp. 54-58, *infra*).

[40] Even where "First Amendment rights are implicated * * *" (*Kleindienst* v. *Mandel*, *supra*, 408 U.S. at 765), federal action concerning aliens is not subject to as great an extent of judicial scrutiny as would be appropriate in almost any other context. *Id.* at 770.

The regulation before the Court has not been—and could not be—challenged as contravening any explicit Constitutional prohibition, nor as impinging upon the exercise of liberties protected by the Bill of Rights.[41] Because limitation of the employment of aliens in the federal competitive civil service thus does not clash with any pertinent substantive limitation on the power of the federal government, the constitutionality of the regulation must be sustained without consideration of the rationality or the substantiality of the reasons that might underly it.

B. The Regulation In Suit Is Valid Even If Equal Protection Principles Do Apply.

We have argued that equal protection principles are inappropriately invoked here. Alternatively, we submit that the regulation limiting employment of aliens in the federal competitive civil service is justified, even if subjected to equal protection analysis.

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[41] This Court has never held that the right to be hired by the federal government (as opposed to retention of such a job) constitutes "liberty" or "property" within the meaning of the Due Process clause of the Fifth Amendment. Cf. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 894-898. The well-settled rule is that, "[i]n the area of federal regulation of government employees, * * * in the absence of statutory limitation the governmental employer has had virtually uncontrolled latitude in decisions as to hiring * * *" (*Arnett* v. *Kennedy*, No. 72-1118, decided April 16, 1974, slip op. p. 17), at least when the ground for decision is not "patently arbitrary" (*Cafeteria Workers* v. *McElroy*, *supra*, 367 U.S. at 898) or does not infringe upon the employee's "constitutionally protected interests—especially his interest in freedom of speech." *Perry* v. *Sindermann*, 408 U.S. 593, 597. See also *Sampson* v. *Murray*, 415 U.S. 61, 70, n. 17, 83.

At the outset, we must recognize that the Court has developed two distinct equal protection standards, one for the usual case, another for those instances where a "suspect classification" or "fundamental constitutional right" is involved. Under the "traditional" analysis, a federal statute "must be sustained if the classification itself is rationally related to a legitimate governmental interest." *United States Department of Agriculture* v. *Moreno*, *supra*, 413 U.S. at 533 (citing cases). See also *United Public Workers* v. *Mitchell*, 330 U.S. 75, 101. In considering a proferred "rational basis" for a legislative classification, moreover, "it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, as it is irrelevant that the section does not extend to all to whom the postulated rationale might in logic apply." *Flemming* v. *Nestor*, *supra*, 363 U.S. at 612; see *McGowan* v. *Maryland*, 366 U.S. 420, 426. The law or regulation may withstand constitutional challenge although it is underinclusive (*Geduldig* v. *Aiello*, No. 73-640, decided June 17, 1974, slip op. pp. 9-10), or overbroad (*Dandridge* v. *Williams*, 397 U.S. 471, 484-485). See also *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 50-55.

On the other hand, the Court, in special cases involving "inherently suspect" classifications or "fundamental rights," has imposed a more stringent standard. In those instances, it is said that the measure must withstand "strict scrutiny" and be shown to be justified by a "compelling governmental interest."

This test was applied in *Sugarman* to state rules barring aliens from state jobs and was invoked by respondents and the court of appeals in this case.

Accordingly, it would seem appropriate to determine first which test governs our case (assuming equal protection principles apply at all, as we do for the purpose of the ensuing discussion). If we do not strictly follow that course here, it is only because, in our view, much the same considerations determine both the proper standard and the sufficiency of the justification behind the regulation. Whatever the correct analysis in a different context, here we believe the two issues are so intermingled that it is impractical to separate them without indulging in undue repetition. What follows, therefore, should be understood to suggest (1) that the "rational basis" test is applicable and satisfied, and (2) that, if the "compelling interest" test governs, it, too, has been met.

1. *The Reasonableness Of A General Requirement Of Citizenship For Employment In The Federal Competitive Civil Service Is Supported By The Fact That It Has Been Imposed By Congress And The Executive For More Than 100 Years.*

As we show in detail below (see pp. 72-85, *infra*), for more than 100 years it has been the policy and practice of the federal government generally to limit or ban the employment of aliens in the federal competitive civil service. While not always compelled by explicit statutory command, that policy has been implemented with the knowledge and clear approval of Congress and the Executive throughout that

period, has repeatedly been reinforced by specific legislation containing comparable requirements, and has been embodied in the formal Rules of the Civil Service Commission since they were initially promulgated by President Arthur in 1883.[42]

We do not argue, of course, that the mere antiquity and persistence of the citizenship limitation disposes of any challenge to its constitutionality. That history does suggest, however, that a citizenship requirement has, upon due consideration by various Congresses, Presidents and Civil Service Commissioners, been deemed a reasonable requirement that serves legitimate governmental interests. Such collective historical judgments are not lightly to be dismissed. As this Court observed in sustaining the constitutionality of property tax exemptions for religious organizations, although "no one acquires a vested or protected right in violation of the Constitution by long use, * * * [y]et an unbroken practice * * * openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 678; see *McGautha* v. *California*, 402 U.S. 183, 203; *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31, cf. *San Antonio Independent School Dist.* v. *Rodriguez*, *supra*, 411 U.S. at 55.

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[42] The present regulations are actually less restrictive than those initially adopted, in that limited exceptions to the citizenship requirement have since been adopted (see pp. 80-82, *infra*).

2. *Exclusion Of Aliens From The Civil Service Is A Long-Standing And Widely-Followed Policy Of Other Nations And Is Consistent With International Law.*

In England, it was recognized early that an alien did not have the legal capacity to hold official positions under the Crown. See 9 Holdsworth, *History of English Law* 91-92 (1926). Section 3 of the Act of Settlement of 1700 (12 & 13 Will. 3, c. 2), provided that

> no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (* * * except such as are born of English parents) shall be capable to be of the privy council, or a member of either house of parliament, or to enjoy any office or place of trust, either civil or military, or to have any grant of lands, tenements or hereditaments from the crown, to himself or to any other or others in trust for him.

The disability extended to the least significant offices (see, *e.g.*, *R.* v. *Ferdinand de Mierre*, 5 Burr. 2787 (1771) (constable); *Anthony* v. *Seger*, 1 Hagg. Con. 9 (1789) (church warden)), as well as to the highest positions in the realm (*Newburgh Peerage Case*, 90 H. L. Journal 491 (1858) (peer)).[43] Simi-

[43] At present, aliens are excluded from the civil service by the Aliens Restriction (Amendment) Act, 1919 (9 & 10 Geo. 5, c. 92), Sec. 6, which provides: "After the passing of this Act no alien shall be appointed to any office or place in the Civil Service of the State." That Act was amended by the Aliens' Employment Act, 1955 (4 Eliz. 2, c. 18), which permits the employment of an alien in a civil capacity under the Crown (a) where he is appointed and employed abroad in appropriate service, or (b) where his employment is warranted by a certificate issued by the responsible minister with the consent of the Treasury.

larly, employment in the public service is uniformly limited to citizens in civil law countries, most of whose civil service laws antedated the formal establishment of the federal civil service in this country."

[44] See, *e.g.*, *France*: Ordonance No. 59-244, of Feb. 4, 1959, Art. 16:

"Nul ne doit être nommé a un emploi public s'il ne possède la nationalité française sous reserve des incapacités prévues par le Code de la Nationalité Française."

[No person may be appointed to public office unless he possesses French nationality, subject to the provisions of the Code on French Nationality.]

Germany: Bundesbeamtengesetz (Law on Federal Civil Service) of Jul. 14, 1953, § 7(1):

"In das Beamtenverhältnis darf nur berufen werden, wer

1. Deutcher im Sinne des Artikels 116 des Grundgesetzes ist * * *."

[Only those who are Germans within the meaning of Art. 116 of the Basic Law, may be admitted into the civil service.]

Italy: Statuto degli Impiegati Civili dello Stato (Statute on Civil Employment by the State), Art. 2:

Possono accedere agli impieghi civili dello Stato coloro che posseggono i sequenti requisiti generali:

1) cittadinanza italiana * * *."

[Those may be employed by the state as civil servants who meet the following general requisites: (1) Italian citizenship.]

Finally, further evidence of the reasonableness of the exclusion of aliens from public employment is found in public international law, which this Court has traditionally referred to in applying domestic law touching upon subjects which, in inter-governmental relations, are governed by principles of that law. See, *e.g.*, *Galvan* v. *Press*, *supra*, 347 U.S. at 531-532;

Netherlands: Grondwet voor het Koninkrijk der Nederlanden (Constitution of the Kingdom of The Netherlands), Art. 5:

"1. Iedere Nederlander is tot elke landsbediening benoembaar.

2. Geen vreemdeling is hiertoe benoembaar dan volgens de bepalingen der wet."

[1. Every Netherlands subject shall be eligible for appointment to any office in the service of the state.

2. No alien shall be eligible for such appointment save in accordance with the provisions of special law.]

Switzerland: Bundesgesetz über das Dienstverhältnis der Bundesbeamten (Federal Law Governing the Relationship of Federal Civil Servants) of Jun. 30, 1927, Art. 2:

"Wählbar als Beamter ist jeder Schweizerbürger männlichen oder weiblichen Geschlechts, der einen unbescholtenen Leumund geniesst * * *."

[Every Swiss citizen, of male or female sex, may be appointed as civil servant if he enjoys a good reputation.]

For a general survey of the domestic laws of other countries, see United Nations, Department of Economic and Social Affairs, Public Administration Branch, *Handbook of Civil Service Laws and Practices* (1966). At the time of that survey, only Ethiopia did not restrict public service posts to nationals. *Id.* at 329.

Harisiades v. *Shaughnessy*, *supra*, 342 U.S. at 585-586; *Lau Ow Bew* v. *United States*, 144 U.S. 47, 61-62, cf. *United States* v. *California*, 381 U.S. 139, 165. Writers and publicists on international law are unanimous that international law does not require that aliens be treated as nationals as long as there is a reasonable basis for different treatment. All positions impressed with a public interest, and the performance of functions in a public capacity, may be reserved exclusively to nationals of a country. As stated in Roth, *The Minimum Standard of International Law Applied to Aliens* 151-152 (1949):

> Under political rights we understand rights which enable the individual to take part in the exercise of the State power, and to participate in any manner in the formulation of the will of the State. It is unanimously agreed that according to common international law the alien may be excluded from the possession of the rights which normally belong solely to the nationals of the State.
>
> • • • • •
>
> In accordance with this general rule, it is furthermore universally recognized that the State of residence may exclude aliens from all public employment, civil or military and from all functions which include a delegation of a part of public power.

See also 1 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 650 (1945); Freeman, *Denial of Justice* 510 (1938); Borchard, *Diplomatic Protection of Citizens Abroad*

62 (1915); Cutler, *The Treatment of Foreigners*, 27 Am. J. Int'l L. 225, 228 (1933).

3. *The Plenary Federal Power To Regulate With Respect To Aliens Justifies A Federal Regulation That Would Be Impermissible If Promulgated By A State.*

In *Sugarman* v. *Dougall*, *supra*, this Court recognized that a state had an interest "in limiting participation in * * * [its] government to those who are within 'the basic conception of a political community'" (413 U.S. at 642), that "alienage itself is a factor that reasonably could be employed in defining 'political community'" (*id.* at 649), that a state has "historical power to exclude aliens from participation in its democratic political institutions" (*id.* at 648), and that, at a minimum, a state could constitutionally prescribe citizenship as a qualification "for officers who participate directly in the formulation, execution, or review of broad public policy functions that go to the heart of representative government." *Id.* at 647. These considerations apply no less to the federal government than to a state government.

In *Sugarman*, however, the Court struck down a state statute requiring that all persons in the competitive civil service of the state be citizens of the United States, because, in view of the "narrow limits" of state power to legislate with respect to aliens and the strict scrutiny to which state classifications based on alienage are subject (*id.* at 642), the ban on employment of persons who were not citizens of the United States was broader than required by legitimate

state interests. The Court added that it would not be so demanding in scrutinizing provisions concerning alienage that rest upon "constitutional prerogatives" not involved in *Sugarman* (*id.* at 648), and specifically noted that its decision did not necessarily apply to citizenship requirements for federal employment. *Id.* at 646, n. 12. The court below, we submit, erred by ignoring the caveats. Our case is not controlled by *Sugarman*.

We have already argued that plenary federal power with respect to aliens removes this case from equal protection analysis. But, at the least, the existence of such a power in the federal government, and the absence of comparable state power, distinguishes our case. Here, an explicit "constitutional prerogative" justifies the regulation. When a state imposes a like restriction, not only can it invoke no comparable prerogative, it must also overcome a potential conflict with the exercise of federal power.

Because the Constitution vests exclusively in Congress the plenary power to legislate with respect to immigration and naturalization, the power of the states to regulate the rights, conduct, and affairs of aliens is very limited. *Hines* v. *Davidowitz*, 312 U.S. 52, 66-68; *Graham* v. *Richardson*, *supra*, 403 U.S. at 374-378; *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 646-649. An important benefit to aliens flowing from the existence of comprehensive federal power to regulate with respect to aliens is that it precludes state regulation that is more severe and burdensome. For example, in *Truax* v. *Raich*, 239 U.S. 33, the

Court struck down a state law that limited the ability of all private employers to hire aliens. The Court held that a lawfully admitted alien had a federal privilege to enter and abide in any state of the Union, and that this privilege carried with it the right to work there "in the common occupations of the community." *Id.* at 41. In *Hines* v. *Davidowitz*, *supra*, the Court invalidated, because it conflicted with federal law, a state law requiring the annual registration and fingerprinting of aliens. And in *Graham* v. *Richardson*, *supra*, the Court voided state laws limiting eligibility of aliens to welfare assistance, because Congress, in providing that persons who were likely to become public charges could not be admitted to the United States and that any alien who became a public charge within five years of his admission was to be deported unless he could show that the causes of his economic situation arose after his entry, had in effect declared that lawfully admitted resident aliens who became public charges for causes arising after their entry were entitled to the full and equal benefit of all laws for the security of persons and property. 403 U.S. at 376-380.[45]

As the Court noted in *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 646, state-imposed restrictions on employ-

[45] In *Zschernig* v. *Miller*, 389 U.S. 429, the Court invalidated a state law limiting inheritance of personal property by aliens from certain countries because it impermissibly intruded into an area of federal authority, even though it did not conflict with any existing treaty or act of Congress.

ment of aliens may also be regarded as conflicting with the comprehensive authority of the federal government concerning aliens. Obstacles to assertions of federal authority concerning the rights of aliens imposed by state laws create potential problems in the exercise of federal responsibilities for foreign relations and treaty-making. The United States has entered into numerous reciprocal treaties touching upon the employment rights of aliens in this country and of United States citizens in other countries. See, *e.g.*, *Asakura* v. *Seattle*, 265 U.S. 332, 341-342. See generally 8 Whiteman, *Digest of International Law* 429, *et seq.* (1967); Wilson, *Postwar Commercial Treaties of the United States*, 43 Am. J. Int'l L. 262 (1949); Comment, *International Law—Reservations to Commercial Treaties Dealing with Aliens' Rights to Engage in the Professions*, 52 Mich. L. Rev. 1184 (1954). While those treaties typically do not expressly cover employment in the civil service of the respective contracting parties, that would be an appropriate subject for such a treaty provision, particularly in view of the nearly universal practice among nations of restricting the employment of aliens in the civil service (see pp. 54-58, *supra*). If, however, the United States were held to be obliged severely to limit or to eliminate the exclusion of aliens from civil service employment, it would be deprived of the basis for negotiating the reciprocal termination of comparable discrimination against the employment of American citizens in the civil services of other countries.

Moreover, state laws limiting the employment rights of aliens—whether in public or private employment—"may well adversely affect the power of the central government to deal with those problems" (*Zschernig* v. *Miller, supra*, 389 U.S. at 441), whether by negotiation or by enactment of reciprocal provisions (cf. 28 U.S.C. 2502; 46 U.S.C. 785), while comparable federal restrictions would not have the same adverse effects.

In light of the *prima facie* absence of state power, this Court has indicated that classifications in state law "based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham* v. *Richardson, supra*, 403 U.S. at 372 (alternative holding); *Sugarman* v. *Dougall, supra*, 413 U.S. at 642; *In re Griffiths, supra*, 413 U.S. at 721. But, because federal power to regulate with respect to aliens is expressly conferred, and is plenary (see pp. 42-50, *supra*), the proposition that alienage is a "suspect" category subject to "strict scrutiny" is not applicable here. We submit that the same standard cannot be applied and that a federal law or regulation concerning aliens may well be constitutional even though an identical state statute would be invalid. Cf. *Head Money Cases*, 112 U.S. 580, 591-594; *Oyama* v. *California*, 332 U.S. 633, 646; *Richardson* v. *Ramirez*, No. 72-1589, decided June 24, 1974, slip op. pp. 28-29. See also *Roth* v. *United States*, 354 U.S. 476, 503-505 (Harlan, J., concurring in part).

4. *Federal Civil Service Employment Involves Unique Responsibilities And Relationships To Which A Citizenship Requirement Bears A Substantial Relationship Not Existing With Respect To State Civil Service.*

Federal government employment differs from state employment in certain pertinent respects that were, of course, not dealt with in *Sugarman*. The United States, unlike a state, is a nation in an international political community. See *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-318. As such, it may lay claims on the loyalty and allegiance of its native population in a manner not open to a state. Cf. *Minor* v. *Happersett, supra*, 21 Wall. at 165-166.[46]

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[46] As stated in a comprehensive study by the American Assembly of Columbia University (*The Federal Government Service* 165 (2d ed., 1965):

> The [national] state, whether viewed as sovereign itself or as the expression of the will of a sovereign people, yields to no other power and demands the final allegiance of its members (citizens). Employees of the state stand in a special relation to it; they are presumed to be servants of a sovereign authority.
>
> We need not here indulge in argument about the theoretic validity of sovereignty in a democratic state. The idea behind it, however valid, has shaped, in a number of ways, the nature of public employment. • • • [I]t is presumed to demand, on the part of public employees as individuals, a special kind of loyalty—a loyalty running beyond the immediate job and organization and to the government as a whole. This loyalty brooks no rival if another allegiance undertakes or threatens to compete with it. The problems involved in the enforcement of such a single-minded loyalty have long been a source of difficulties in our national government. • • •

As a sovereign nation, moreover, the United States has uniquely national responsibilities for such matters as war, international relations, and foreign commerce (cf. pp. 46-48, *supra*), concerning which the undivided allegiance of its employees to the nation may reasonably be thought indispensable. Lack of citizenship or permanent allegiance to the United States may therefore more readily present problems in federal employment—at any level—than in state employment. Indeed, the alien does not merely lack allegiance to the United States, under international law, but in most cases still owes an affirmative duty of allegiance to a foreign nation, thereby leaving "outstanding a foreign call on his loyalties * * *." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 585-586.

The unique status of civil service, moreover, pervades all ranks and is not limited to policy-making positions. Indeed, as Mr. Justice Douglas stated in *United Public Workers* v. *Mitchell*, *supra*, 330 U.S. at 121:

> [T]op policy men in administrations will come and go; new laws will be passed and old ones amended or repealed. But those who give continuity to administration, those who contribute the basic skill and efficiency to the daily work of government, and those on whom the new as well as the old administration is dependent for smooth functioning of the complicated machinery of modern government are the core of the civil service.

The citizenship requirement in issue here is better calculated than that involved in *Sugarman* to serve legitimate governmental interests concerning participation in the affairs of the "political community." For example, a government might reasonably conclude that its employees should have a knowledge and understanding of the history, and of the principles and form of its government. A requirement that civil service employees be citizens of the United States would serve that purpose less readily for a state than it would for the federal government. Even native-born citizens, given mobility of population, would not all be likely to have such knowledge and understanding concerning the state where they reside or for which they seek to work than they would have with respect to the government of the United States. Similarly, naturalized citizens are required to have such knowledge and understanding with respect to the government of the United States, as a condition of citizenship (8 U.S.C. 1423(2)) but need not have such knowledge or understanding as to any state government. Accordingly, a requirement of United States citizenship is more reasonably and substantially related to legitimate interests concerning federal civil service employment than state employment. Cf. *Balzac* v. *Porto Rico*, 258 U.S. 298, 310.

5. *The Challenged Regulation Is Not Impermissibly Broad In Scope.*

In the exercise of undeniable governmental authority to prescribe qualifications for federal employment and to extend the privileges of citizenship to aliens, numerous choices had to be made and various lines drawn in balancing the interests of the federal government, as a sovereign nation and as an employer, in promoting the efficiency of the public service it performs, and the interests of those who would become its employees. With respect to citizenship *vel non*, eligibility for federal civil service employment might have been limited entirely to citizens, as has eligibility for other governmental privileges, programs and benefits,[47] or might also have included, for example, others who owe permanent allegiance to the United States,[48] aliens lawfuly admitted for permanent residence,[49] aliens who have declared their intention to become citizens of the United States,[50] aliens permanently residing within the United States

[47] See generally the statutes cited in the Appendix to this brief.

[48] See, *e.g.*, 5 C.F.R. 338.101(a), (b).

[49] *E.g.*, 10 U.S.C. 8253; 42 U.S.C. 428(a); 47 U.S.C. (Supp. II) 310(a).

[50] *E.g.*, 10 U.S.C. 311(a); 30 U.S.C. 22; 43 U.S.C. 161; 47 U.S.C. (Supp. II) 310(a); 48 US.C. 1501, *et seq.*; 83 Stat. 337; 87 Stat. 525.

under color of law,[51] aliens from particular countries,[52] or aliens whose own native countries permit United States citizens to work in their civil service.[53]

Similarly, different lines concerning citizenship might have been drawn for different departments or agencies, or for different positions within a department or agency,[54] or for different grade levels; alternatively, such determinations might have been left to an administrator to make on an *ad hoc* basis with reference to particular positions.[55]

That the Commission's regulation applies instead, as regards persons other than citizens or those owing permanent allegiance to the United States, to all positions within the competitive civil service, at all levels, and in all departments, does not render it impermissibly "overbroad."

There can be no doubt that the formation and execution of policy within the Executive Branch may properly be confined to citizens. *Sugarman* v. *Dougall*,

[51] *E.g.*, 42 U.S.C. (Supp. II) 1382c(a)(1)(B)(ii); cf., *e.g.*, 42 U.S.C. 2713, 2742, 2949(3).

[52] *E.g.*, 42 U.S.C. 2713, 2742, 2949(3); 83 Stat. 337; 87 Stat. 525-526.

[53] Cf., *e.g.*, 10 U.S.C. 7435(a); 15 U.S.C. 1126(b); 26 U.S.C. 901(c); 28 U.S.C. 2502; 42 U.S.C. 402(t)(2); 46 U.S.C. 785. Congress has provided that if a United States citizen undertakes such employment under certain circumstances he loses his American citizenship. 8 U.S.C. 1481(a)(4). But cf. *Afroyim* v. *Rusk*, *supra*.

[54] In certain instances this has been done. See p. 84, *infra*, n. 72.

[55] Cf. *e.g.*, 22 U.S.C. 1044, 1471.

supra, 413 U.S. at 647-649. Nor can there be doubt that there are many types of facilities and installations where even menial jobs may properly be restricted to those who owe the nation allegiance. This being true, the Civil Service Commission, having been delegated the broad constitutional powers of the Congress and the President with respect to government employment and the status of aliens, properly may conclude that the needs of government are best served by a general rule requiring citizenship for employment in the federal competitive civil service. Any other rule would require the classification of all the enormous variety of federal jobs, and their constant reclassification as jobs are created, modified, shifted, and redefined. Moreover, all aliens permitted to work at menial tasks would have to be monitored to make sure that they were not transferred to facilities or installations from which they could unquestionably be properly excluded.

While this enormous administrative burden would fall initially upon the Executive Branch, the exercise of the Executive's discretion would no doubt be regularly challenged in the courts, and the judiciary would be drawn into the continuing process of classifying and reclassifying jobs. This very case suggests the beginning of the problem, for while one respondent wants to be a federal janitor, another wants employment with the Department of Health, Education, and Welfare as an evaluator of educational programs, surely a task with policy implications. The latter respondent has lived in this country for 28 years without becoming a citizen, which suggests a voluntary choice to commit her allegiance to some other country rather than to this country.

The problem of differentiating among jobs, among facilities, and, indeed, among different categories of aliens, is so large and intricate, and risks of an unduly narrow application of a citizenship requirement so potentially serious, that the courts ought not to thrust that task upon the Executive, or, ultimately, upon themselves, unless the Constitution clearly requires it. To the contrary, the government's constitutional powers over the status of aliens, as well as the problems of administrative convenience, support the general rule established by the regulations.

Indeed, the Commission's regulation is no broader than the prohibitions of the Hatch Act concerning partisan political activity by federal employees, the constitutionality of which was recently reaffirmed in *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548; see *United Public Workers* v. *Mitchell*, *supra*, 330 U.S. at 101-103. A ban covering all employees was sustained there, even though it might reasonably be contended that the principal evil at which the restriction was directed—that federal employees "should administer the law in accordance with the will of Congress, rather than in accordance with their own will or the will of a political party" (413 U.S. at 564-565)—was not presented by partisan political activity by many categories of employees covered by the general ban.[36]

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[36] As Justice Brennan observed in *United States* v. *Robel*, 389 U.S. 258, 270-271, "Congress often regulates indiscrimi-

The gist of respondents' complaint is that the lines drawn with respect to eligibility of aliens for the governmental positions they seek should have been different, and that Congress and the Executive Branch should have opened such jobs to all aliens residing in the United States. (Indeed, their complaint does not even limit their claim to aliens who have lawfully entered or remained in this country.) However, as this Court noted in *United Public Workers* v. *Mitchell*, *supra*, 330 U.S. at 102:

> Whatever differences there may be between * * * [different classes of] employees of the government * * * are differences in detail so far as the constitutional power under review is concerned. Whether there are such differences and what weight to attach to them, are all matters of detail for Congress. * * * The use of the constitutional power of regulation is for Congress, not for the courts.

Respondents' contention that the courts should "strike a different balance" (*Civil Service Commission* v. *Letter Carriers*, *supra*, 413 U.S. at 564) than the one struck by Congress and the Executive Branch should be rejected. While those branches might so

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nately, through preventive or prophylactic measures, * * * and * * * such regulation has been upheld even where fundamental freedoms are potentially affected * * *." In such cases the Court must "assume * * * that Congress may have been justified in its conclusion that alternatives to [the challenged regulation] * * * were inadequate." *Id.* at 271. Here, of course, no fundamental freedoms are affected by the challenged requirement (see p. 50, *supra*, n. 41).

choose, this Court ought not require them to do so, because "the balance it has so far struck is sustainable by the obviously important interests sought to be served by the [challenged] limitations * * *." *Ibid.*[57]

II. THE CHALLENGED REGULATION DOES NOT EXCEED THE AUTHORITY GRANTED BY CONGRESS AND IS NOT IN CONFLICT WITH APPLICABLE STATUTES OR EXECUTIVE ORDERS.

Both courts below rejected respondents' contentions that Section 338.101 of the Civil Service Commission's regulations exceeded the authority granted by Congress in the civil service laws and were inconsistent with other statutes and an executive order prohibiting discrimination in federal employment on the basis of "national origin." As we shall show, these rulings were correct.

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[57] The validity of the regulation is not affected by the fact that it applies only to positions in the competitive civil service. Occupants of other positions, such as the high-ranking policy positions, are ordinarily subject to a more extensive level of consideration and investigation, including in many instances the explicit requirement of approval by the Senate. The existence of such forms of high-level scrutiny, which is typically not present with respect to positions in the competitive civil service, may be thought to further without explicit compulsion the same interests that are served by the regulation.

A. The Civil Service Laws Authorized The Civil Service Commission To Establish Citizenship As A Criterion For Employment In The Federal Competitive Civil Service.

Section 338.101 of the Civil Service Commission's regulations here under challenge (*supra*, pp. 3-4) was promulgated by the Commission under the authority of Section 2.1 of Executive Order No. 10577 of November 22, 1954 (*supra*, p. 3). The authority for the issuance of that Order is derived largely from the Pendleton Civil Service Act of 1883 (22 Stat. 403), "the keystone in the present arch of Civil Service legislation * * *" (*Arnett* v. *Kennedy*, No. 72-1118, decided April 16, 1974, slip op. p. 14), which authorized the President to promulgate rules to carry the Act into effect, and created the present Civil Service Commission to aid the President in implementing the Act.

Prior to the Pendleton Act, there were few explicit legal requirements pertaining to employment by the Federal government. Although the first statute enacted by Congress required all officers of the United States to take an oath to support the Constitution (1 Stat. 24, as amended, 5 U.S.C. 3331), there was no explicit requirement of United States citizenship. Of course, as a result of policy and practice, selection of the relatively few employees of the federal government in the 19th Century was presumably limited principally to citizens even without explicit statutes or regulations.

In any event, federal positions became objects of political pressures and the "spoils" system of patronage, the abuses in which led to a reform movement that culminated in enactment of the Pendleton Act. See generally, *e.g.*, Rosenbloom, *Federal Civil Service and the Constitution* 19-60 (1971); United States Civil Service Commission, *History of the Federal Civil Service, 1789 to the Present* 1-52 (1941); Van Riper, *History of the United States Civil Service* 11-95 (1958). Significantly, one of the earliest reform measures,[58] a short-lived provision enacted in 1856 for the appointment of consular pupils, had required that appointees be citizens of the United States (11 Stat. 55, repealed by 11 Stat. 160), and a similar explicit citizenship requirement was imposed with respect to all diplomatic or consular officers. 11 Stat. 60. A further effort at reform resulted in a rider to an appropriations act in 1871, which authorized the President "to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate," and to "employ suitable persons to conduct such inquiries." 16 Stat. 514-515;[59] see Rev. Stat. 1753.

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[58] In 1853 Congress established a system of classification of clerks and provided that no clerks could be appointed by the Departments of Treasury, War, Navy, Interior, or Post Office unless they had been examined and found qualified by a board within the Department. 10 Stat. 209-211; see Rev. Stat. 164. In 1855 this requirement was extended to clerks at the Department of State. 10 Stat. 669.

[59] The statute provided in pertinent part:

> The President is authorized to prescribe such regulations for the admission of persons into the civil service

President Grant then appointed a civil service commission which established a system of competitive examinations for employment and promotion. Due to the refusal of Congress to appropriate funds after 1874, the general examination system was suspended and the work of the commission continued only in a very limited, experimental basis. See S. Rep. No. 576, 47th Cong., 1st Sess., pp. V-VIII. Although the 1871 statute contained no explicit requirement of citizenship, the examinations conducted by this commission had been "open to every citizen * * *" (*id.* at VI) but not to non-citizens. See Appendix to S. Rep. No. 576, *supra*, at 24. The commission created under the 1871 enactment was superseded by the body created by the Pendleton Act.[60]

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of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service.

[60] The Pendleton Act provided in pertinent part (22 Stat. 403-406):

[T]he President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as Civil Service Commissioners, and said three commissioners shall constitute the United States Civil Service Commission. * * *

SEC. 2. That it shall be the duty of said commissioners:

FIRST. To aid the President, as he may request, in

As presently codified, the pertinent provisions of the 1871 civil service law and the Pendleton Act state (5 U.S.C. 3301):

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preparing suitable rules for carrying this act into effect * * *.

SECOND. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

* * * * *

THIRD. Said commission shall, subject to the rules that may be made by the President, make regulations for, and have control of, such examinations, and, through its members or the examiners, it shall supervise and preserve the records of the same. * * *

* * * * *

SEC. 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes * * *.

The President may—

(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;

(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and

(3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

Although Section 3301 itself, unlike the Executive Order and the Commission's regulation, does not use the term "citizen" or "citizenship" as one of the qualifications for the admission to the civil service, the relevant legislative history of the Pendleton Act establishes convincingly that employment in the federal civil service could properly be limited to citizens.

As introduced by Senator Pendleton [61] and as reported out by the Senate Committee on Civil Service and Retrenchment, the bill was prefaced by a preamble setting forth the legislative purpose in the

[61] The bill was drafted by Dorman B. Eaton, Chairman of the Executive Committee of the New York Civil Service Reform Association, which was organized in 1877 to propose reforms in the civil service. Kaplan, *The Law of Civil Service* 9-10 (1958). Mr. Eaton was simultaneously the chairman of the civil service commission established by President Grant under the 1871 law. See Appendix to S. Rep. No. 576, *supra*, p. 12. After passage of the Pendleton Act, Mr. Eaton became the first Chairman of the Civil Service Commission. Kaplan, *supra*, at 10.

following language (S. Rep. No. 576, 47th Cong., 1st Sess., p. XII; emphasis added):

> Whereas common justice requires that, so far as practicable, *all citizens* duly qualified shall be allowed equal opportunities, on grounds of personal fitness, for securing appointments, employment, and promotion in the subordinate civil service of the United States * * *.

The preamble was omitted from the final bill for the reason that "[n]o preamble is necessary in a bill of this kind." 14 Cong. Rec. 661 (Statement of Senator Edmunds).

The Committee report also indicated an expectation that office-holders in the civil service would be "citizens." It stated (S. Rep. No. 576, *supra*, at XII):

> [C]itizens when they become office-holders do not cease to be citizens, or lose any of the rights or avoid any of the responsibilities of citizenship. * * * On the contrary, they are bound by an additional obligation to the performance of every duty of a good citizen. * * * None of the provisions of this bill, if it shall become a law, will make an officer less a citizen. All of its provisions will make him a better citizen, leading, encouraging, coercing him to the better performance of his own duties and to the elevation of the standard of excellence of those above and below him in the rank of official station.

Dorman Eaton, the original draftsman and principal proponent of the Pendleton bill, and later the first Chairman of the Commission (see p. 76, *supra*,

n. 61), repeatedly expressed the view that only citizens would qualify for civil service positions. See Appendix to S. Rep. No. 576, *supra*, at 6, 15, 22-26.[62]

The Congressional debates on the Pendleton bill also leave no doubt that Congress understood and meant that eligibility for admission to and appointment in the competitive civil service could be confined to citizens.[63]

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[62] A companion bill introduced by Senator Dawes (S. 939) would have expressly provided that "appointments are open to competition to any citizen of the United States, male or female. * * * [V]acancies shall be filled by competitive examinations open to all citizens, in conformity with the provisions of this act * * *." Appendix to S. Rep. No. 576, *supra*, at 4. The Dawes bill was criticized before the Senate Committee on the ground, among others, that it undertook to spell out the qualifications of applicants for civil service positions; it was Mr. Eaton's view that qualifications should be established by the President through his rule-making powers, as had been done earlier under the 1871 act. Appendix to S. Rep. No. 576, *supra*, at 24.

[63] See, *e.g.*, 14 Cong. Rec. 243 (Sen. Hawley: "It will be among the duties of the commission to devise rules for conducting examinations * * *. There will be requirements—anybody can think of a few in a moment—*the applicant must be a citizen of the United States*"); *id.* at 280 (Sen. Brown: "[L]et *every citizen* who feels that he has claims superior to an inferior man now in position go and compete for the prize"); *id.* at 321 (Sen. Miller: "[*E*]*very citizen* * * * shall have an equal opportunity for public employment"); *id.* at 361 (Sen. Jones: "It is intended to extend the power of appointment so as to embrace *all American citizens*"); *id.* at 566 (Sens. Brown and Pugh, proposed amendment: "And all persons now in the Civil Service thus classified are subject, *like all other citizens*, to the operations of this act; * * * there shall be appointed * * * an equal number of persons, who shall be, when appointed, *bona fide citizens*"); *id.* at 607 (Sen. Hoar: the Commissioners "are to present him, by selection and examination from the entire country on the ground of merit, *certain citizens* whose capacity for office and fitness they have ascertained") (emphasis added).

Pursuant to the Pendleton Act, President Arthur promulgated the first Civil Service Rules on May 7, 1883. Rule XI provided in pertinent part:

> Every application, in order to entitle the applicant to appear for examination or to be examined, must state, under oath, the facts on the following subjects: 1. Full name, residence, and post office address. 2. *Citizenship.* * * * [*First Report of the United States Civil Service Commission* 47 (1884) (emphasis added)].[64]

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[64] In its first report to Congress, the Commission gave the following explanation of the procedures it had adopted for holding competitive examinations:

> The application thus filled is returned to the Commission or to the proper Examining Board, and if its statements show that the applicant is regularly vouched for, and *that he is entitled by* age, health and *citizenship to be examined* for the service he seeks, his name is entered upon the proper record, with the date of his application, and his paper is placed on file. When the next examination is held, at a point which seems convenient for him, he is notified to be present. [*First Report of the United States Civil Service Commission* 19 (1884) (emphasis added)].

The "Instructions to Applicants who wish to Enter the United States Civil Service," reprinted in the *Second Report of the United States Civil Service Commission* 83 (1885), stated in pertinent part (emphasis added):

> WHO MAY BE EXAMINED.—(1) Only *citizens of the United States* of the proper age can be admitted to the examinations, and no person habitually using intoxicating beverages to excess can be appointed.

The original Rules were revised, renumbered and amended in the ensuing years. In a revision of the Rules undertaken in 1894 (*Twelfth Report of the United States Civil Service Commission* 10 (1894-1895)), the citizenship qualification was reworded and included in Rule V of the Civil Service Rules of May 6, 1896:

> 1. Every applicant for examination must be a *citizen of the United States*, must be of proper age, and must make an application under oath, upon a form prescribed by the Commission, and accompanied by such certificates as may be prescribed [*Thirteenth Report of the United States Civil Service Commission* 57 (1895-1896) (emphasis added)].

Rule V was amended in 1903 by President Theodore Roosevelt to permit persons who "owe allegiance to the United States" to qualify for the competitive civil service.[65] *Twentieth Report of the United States Civil Service Commission* 48 (1904).[66]

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[65] The Civil Service Commission explained that this amendment was designed to make eligible for the civil service persons in Puerto Rico and in the Philippines (*Twentieth Report*, *supra*, at 9), who then had the status of non-citizen nationals of the United States (see p. 4, *supra*, n. 1).

[66] By Executive Order No. 458, on June 13, 1906, President Roosevelt again amended Rule V by adding the following proviso:

> *Provided*, That when an examination has been duly announced to fill a vacancy and there is lack of eligibles who are citizens, the Commission may, in its discretion, examine persons who are not citizens, but they shall not be certified for appointment so long as citizens are eligible [*Twenty-Third Annual Report of the United States Civil Service Commission* 92 (1906)].

Section 2.1(a) of Executive Order No. 10577, issued by President Eisenhower on November 22, 1954 (19 Fed. Reg. 7521), continues in force to this day the requirement that the Civil Service Commission establish standards with respect to citizenship (*supra*, p. 3); the Commission, in turn, has continued until the present the general requirement that a person may be admitted to the competitive examination, and may be given appointment, only "if he is a citizen of or owes permanent allegiance to the United States." 5 C.F.R. 338.101(a), (b), see *supra*, pp. 3-4).[67]

Exceptions can be made with the approval of the Commission in cases of a limited executive assignment under 5 C.F.R. 305.509[68] in the absence of

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Prior to this general authorization to examine aliens, an executive order waiving the citizenship requirement had been necessary if an alien were to be hired because of a lack of qualified citizens. See, *e.g.*, Executive Order No. 434, March 28, 1906.

[67] The phrase "owes permanent allegiance to the United States" is interpreted by the Commission to be currently applicable only to natives of American Samoa (see p. 4, *supra*, n. 1).

[68] Section 305.509 provides in pertinent part:

> *Limited executive assignments.*
>
> (a) *Authorization.* The Commission may authorize an agency to fill a position by limited executive assignment when:
>
> (1) The position is expected to be of limited duration, or

qualified citizens, or, "in rare cases," under 5 C.F.R. 316.601,[69] unless appointment is prohibited by statute. 5 C.F.R. 338.101(b)(1), (2).

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(2) The agency establishes an unusual need for urgent staffing that cannot adequately be met under the procedures required for career executive assignments.

(b) *Time limit.* The Commission shall specify a time limit within which an agency may use an authority for limited executive assignment, and may revoke the authority at any time.

(c) *Tenure and status.* An employee may serve a maximum of 5 continuous years and does not acquire competitive status under limited executive assignment.

The provision authorizing limited executive assignments of aliens pursuant to Section 305.509 was added to Section 338.101 in 1968. 33 Fed. Rep. 12417.

[69] Section 316.601 provides:

Appointment without competitive examination in rare cases.

(a) The Commission may authorize an agency to make an appointment without competitive examination when the Commission:

(1) Finds that the duties and compensation of the position are such, or that qualified persons are so rare, that in the interest of good civil service administration the position cannot be filled through open competitive examination; and

(2) Receives satisfactory evidence of the qualifications of the person to be appointed.

(b) A person appointed under paragraph (a) of this section does not acquire a competitive status on the basis of that appointment.

(c) When a position filled under paragraph (a) of this section becomes vacant, the agency may fill the vacancy by another appointment under paragraph (a) of this section only with the express prior approval of the Commission in accordance with this section.

The provision authorizing appointment of aliens without competitive examinations pursuant to Section 316.601 was added to the predecessor of Section 338.101 in 1954. 19 Fed. Reg. 8608.

However, most components of the civil service—whether in the competitive service or the "excepted service" [70]—are now subject to statutory limitations on the employment of aliens in the continental United States contained in provisions in appropriation legislation similar to restrictions enacted annually since 1938.[71] The restriction in effect at the time this action was begun was contained in Section 502 of the Public Works Appropriation Act, 1970, 83 Stat. 336 (see p. 7, *supra*, n. 8). In language almost identical to that used in the appropriation acts of 1938, it prohibits the use of appropriated funds for payment of salaries to almost all alien employees of the United States whose post of duty is in continental United

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[70] Position in the excepted service—*i.e.*, "positions other than those of a confidential or policy-determining character for which it is not practicable to examine, and which are excepted from the competitive service" (5 C.F.R. 213.3101(a))—may be filled by aliens in the absence of qualified citizens and with the approval of the Commission. 5 C.F.R. 213.3102(bb).

[71] Treasury-Post Office Appropriation Act, 1939, 52 Stat. 148; Appropriation Act for Departments of State, *et al.*, 1939, 52 Stat. 289-290; Independent Offices Appropriation Act, 1939, 52 Stat. 435; Second Deficiency Appropriation Act, 1938, 52 Stat. 1162-1163.

States without limitation as to whether they are competitive civil service employees."[72]

The basic prohibition of these annual appropriations provisions reinforces the policy reflected in the Commission's regulation, and the exceptions have the effect of merely authorizing payment of salaries to aliens who might otherwise be eligible for federal civil service employment."[73]

From the preceding discussion of the history of the pertinent federal civil service laws and regulations,

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[72] The appropriation act, like many of its predecessors, makes exceptions for temporary employment and employment of nationals of specified countries, including those allied with the United States in its current defense effort. 83 Stat. 336-337.

Congress has on many occasions recognized the general limitations on employment of aliens in the continental United States by enacting a variety of statutory exceptions thereto, in either permanent legislation or annual appropriation acts. *E.g.*, 10 U.S.C. 7473 (Department of the Navy—scientific and technical positions); 20 U.S.C. 46a (Smithsonian Institution—scientific and technical positions); 22 U.S.C. 1044(e) (Department of State—Foreign Service Institute); 42 U.S.C. 2473(b)(10) (National Aeronautics and Space Administration—all employment); 84 Stat. 1489 (Department of Agriculture—Foreign Agricultural Service); 84 Stat. 2029 (Department of Defense—all employment); 84 Stat. 890 (Atomic Energy Commission—all employment); 84 Stat. 1059 (Foreign Claims Settlement Commission—all employment); 84 Stat. 1061 (United States Information Agency—translators); 84 Stat. 823 (Library of Congress—up to ten positions).

[73] Indeed, the identical provision of the Treasury, Postal Service and General Government Appropriation Act of 1973, 86 Stat. 487, as well as 5 C.F.R. 338.101, were held unconstitutional in *United States Civil Service Commission* v. *Ramos*, No. 74-216, appeal docketed.

it is abundantly clear that Congress expected that the Civil Service Commission might require citizenship as a qualification for the competitive civil service, and that, with the full knowledge of Congress, the Commission has maintained such a requirement from the outset of its existence.

The original Civil Service rules thus represented a "contemporaneous construction" of the Commission's own enabling legislation by administrators who "participated in drafting" the Pendleton Act (see p. 76, *supra*, n. 61) and "directly made known their views to Congress in committee hearings," which therefore is entitled to very great weight. *Zuber* v. *Allen*, 396 U.S. 168, 192. In addition, the administrative practices, being known to Congress, having "long continued without substantial change, [and] applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Boehm* v. *Commissioner*, 326 U.S. 287, 291-292; see *First Nat'l Bank* v. *Missouri*, 263 U.S. 640, 658. Accordingly, both the district court (Pet. App. B 29a-31a), and the court of appeals (Pet. App. A 4a-6a) correctly rejected respondents' arguments that the Commission's regulations exceed its statutory authority, or conflict with later appropriation acts.

B. The Limitation On Employment Of Aliens In The Federal Competitive Civil Service Does Not Conflict With Statutory Provisions Or Executive Orders Banning Discrimination In Employment On Grounds Of "National Origin."

Respondents also argued in the district court and on appeal, that Section 338.101 of the Commission's regulations conflicts with Executive Order No. 11478, 34 Fed. Reg. 12985 (1969) (A. 21-22), which prohibits discrimination in the federal civil service on the basis of "national origin." That argument, rejected by both courts below (Pet. App. B 28a; Pet. App. A 7a-12a), requires little discussion.

That the term "national origin" in Executive Order No. 11478 refers solely to ethnic or geographic origin, and not to alienage, is indicated by the fact that the 1954 Executive Order providing for citizenship requirements in civil service employment (*supra*, p. 3) was not among those designated as having been affected by Executive Order No. 11478.

Moreover, only last Term this Court held that "national origin" was not synonymous with "alienage," as used both in the Civil Rights Act of 1964 and in the Equal Employment Opportunity Act of 1972, which extended to the federal government the prohibition of the 1964 Act against employment discrimination based on "national origin."

Thus, in *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, the Court held that an employer's refusal to hire a person because he is not a United States citizen does not constitute employment discrimination on the basis of "national origin" in violation of Section 703 of

the Civil Rights Act of 1964. 42 U.S.C. 2000e-2(a)(1). The Court's construction of the statutory language was based in part on the legislative history of the Act, and in large measure on the Executive Branch's long-standing practice of not equating "national origin" with "alienage." The Court found "compelling reasons" to believe that Congress did not intend the term "national origin" to embrace citizenship requirements, by pointing to the exclusion of aliens from the federal civil service (414 U.S. at 89-91; footnote omitted):

> But it has never been suggested that the citizenship requirement for federal employment constitutes discrimination because of national origin, even though since 1943, various Executive Orders have expressly prohibited discrimination on the basis of national origin in Federal Government employment. See, e.g., Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943); Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969).
>
> Moreover, § 701(b) of Tit. VII, in language closely paralleling § 703, makes it "the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of . . . national origin . . . ." Civil Rights Act of 1964, Pub. L. 88-352, § 701(b), 78 Stat. 254, re-enacted, Pub. L. 89-554, 80 Stat. 523, 5 U. S. C. § 7151. The legislative history of that section reveals no mention of any intent on Congress' part to reverse the longstanding practice of requiring federal employees to be United States citizens. To the contrary, there is every indication that no such reversal was

intended. Congress itself has on several occasions since 1964 enacted statutes barring aliens from federal employment. The Treasury, Postal Service, and General Appropriation Act of 1973, for example, provides that "no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States . . . unless such person (1) is a citizen of the United States." Pub. L. 92-351, § 602, 82 Stat. 487. See also Pub. L. 91-144, § 502, 83 Stat. 336; Pub. L. 91-439, § 502, 84 Stat. 902.

To interpret the term "national origin" to embrace citizenship requirements would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy. This Court cannot lightly find such a breach of faith. * * * So far as federal employment is concerned, we think it plain that Congress has assumed that the ban on national-origin discrimination in § 701(b) did not affect the historical practice of requiring citizenship as a condition of employment. * * * And there is no reason to believe Congress intended the term "national origin" in § 703 to have any broader scope.

In *Morton* v. *Mancari*, *supra*, the Court characterized the 1972 extension of the Civil Rights Act to government employment as being largely "a codification of prior anti-discrimination Executive Orders that had proved ineffective because of inadequate enforcement machinery." Slip op. p. 13. As the Court's unanimous opinion stated (*id.* at 13-14):

There certainly was no indication that the substantive proscription against discrimination was intended to be any broader than that which previously existed. By codifying the existing anti-discrimination provisions, and by providing enforcement machinery for them, there is no reason to presume that Congress affirmatively intended to erase the preferences that previously had coexisted with broad anti-discrimination provisions in Executive Orders.

Espinoza and *Mancari* thus demonstrate that the longstanding use of citizenship as a criterion for federal employment has not been invalidated by the "national origin" provisions contained in Executive Orders or in recent Congressional enactments.

CONCLUSION

The concurrent decisions of Congress and the Executive Branch generally to limit employment of aliens in federal civil service is within the broad powers of the National government both to regulate the conduct of aliens prior to naturalization and to establish the conditions under which persons may exercise a privilege of national citizenship by participating in the affairs of that government as a civil servant. The distinction is rational, is supported by compelling governmental interests, and does not deprive aliens of liberty or property without due process of law. Accordingly, the judgment of the court of appeals should be reversed.

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APPENDIX

Acts of Congress codified in the United States Code, 1970 ed., drawing distinctions between citizens and resident aliens.*

Title 5, Government Organization and Employees:

Sec. 5912. Citizen employees stationed in foreign countries eligible for free use of Government owned or rented quarters.

Sec. 5922. Citizen employees stationed in foreign areas may be authorized certain allowances and differentials.

Sec. 5924. Dependents of citizen employees stationed in Canal Zone authorized certain allowances in connection with travel to and from U. S. schools.

Sec. 7532. Citizens who have been suspended or removed from certain Government agencies are afforded additional procedural rights in appealing suspension or removal, which rights are denied to aliens.

Sec. 8339. Affords certain citizens advantages in computation of annuity upon civil service retirement.

Title 7, Agriculture:

Sec. 1158. Citizens only entitled to indirect protection against foreign expropriation of property.

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* Excluding Title 8, "Aliens and Nationality."

Sec. 1704. Authorizes sale of foreign currencies for dollars to citizens for certain purposes.

Sec. 1922. Secretary of Agriculture authorized to make certain real estate loans only to farmers and ranchers who are citizens.

Sec. 1941. Secretary of Agriculture authorized to make certain operating loans only to farmers and ranchers who are citizens.

*Sec. 1961. Secretary of Agriculture authorized to make certain emergency loans only to farmers, ranchers, or oyster planters who are citizens.

Title 10, Armed Forces:

Sec. 311. Membership in militia restricted to citizens or those declaring intent to become same.

Sec. 1486. Secretaries of military services may authorize use of U. S. mortuary services, on reimbursable basis, to certain citizens dying abroad.

Sec. 2101, *et seq.* Participation in certain Reserve Officer Training programs restricted to citizens.

Sec. 2272. Secretaries of military departments precluded from awarding contracts in aircraft design competition to other than citizens.

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* Declared unconstitutional in *Cabrera* v. *Butz*, D.P.R., Civ. No. 326 (3-judge court), appeal to the Supreme Court noted.

Sec. 2279. Employment of aliens by contractors engaged in aircraft or aircraft parts production for the United States restricted.

Secs. 2668, 2669. Secretaries of military departments authorized to grant citizens certain easements for rights-of-way with respect to public lands withdrawn or reserved for use of such departments.

Sec. 2734. Aliens and foreign states or their political subdivisions may assert tort claims against U. S. in certain cases where citizens may not.

Sec. 3253. Aliens may enlist in Army only subject to certain restrictions.

Sec. 3285. Original appointments in Regular Army limited to citizens.

Sec. 3294. Medical and Dental Corps officers in Regular Army must be citizens.

Sec. 4308. Citizens only eligible for certain marksmanship instruction.

Sec. 5571. Citizenship a prerequisite for appointment as an officer in Regular Navy or Marine Corps.

Sec. 6019. Officers of vessels of the United States must be citizens.

Sec. 6909. Citizenship a prerequisite for certain direct officer procurement programs.

Sec. 6911. Citizenship a prerequisite for enlistment as naval aviation cadet.

Sec. 7435. Aliens may be denied interest in certain U. S. naval fuel reserves, unless foreign

country grants reciprocal rights to U. S. citizens.

Sec. 8253. Aliens must meet additional requirements for enlistment in Air Force.

Sec. 8257. Citizenship necessary for qualification as Regular Air Force aviation cadet.

Sec. 8285. Citizenship necessary for commission in Regular Air Force.

Sec. 8294. Citizenship necessary for commission as officer in Regular Air Force as medical or dental officer.

Title 12, Banks and Banking:

Sec. 72. Directors of national banking associations must be citizens.

Sec. 614. Directors of banks organized to engage in foreign banking must be citizens.

Sec. 619. Controlling interest in banks engaged in foreign business must be held by citizens.

Sec. 636c. Citizenship required for membership on Federal Farm Credit Board.

Sec. 673. Directors of Federal land banks must be citizens.

Sec. 1427. Directors of Federal home loan banks must be citizens.

Sec. 1812. Two of the three Directors of the Federal Deposit Insurance Corporation must be citizens.

Title 13, Census:

Sec. 22. Permanent officers and employees of Bureau of Census must be citizens.

Title 14, Coast Guard:

Sec. 371. Citizenship necessary for enlistment as Coast Guard aviation cadet.

Sec. 823. Coast Guard Auxiliary shall be composed of citizens.

Title 15, Commerce and Trade:

Sec. 144. Majority of incorporators of China Trade Act corporation must be citizens.

Sec. 149. Majority of directors of China Trade Act corporation must be citizens.

Sec. 1124. Protects citizens from importation into U. S. of certain goods bearing infringing trademarks.

Sec. 1126. Citizens and nationals of foreign countries extending reciprocal rights entitled to certain trademark protection benefits.

Sec. 1404. Director of National Traffic Safety Bureau shall be citizen.

Title 16, Conservation:

Sec. 5. Citizens eligible for certain rights-of-way through public lands for power and communications facilities.

Sec. 420. Only citizens eligible for power and communication facility rights-of-way through certain military parks.

Sec. 463. Advisory Board on National Parks, Historic Sites, Buildings, and Monuments, to be composed of citizens only.

Section 468b. General trustees of National Trust for Historic Preservation in the United States must be citizens.

Sec. 522, *et seq.* Only citizens and U. S. corporations and associations eligible for certain rights-of-way through National Forests for electrical plants, mining, etc.

Sec. 554. Forest supervisors and rangers must be selected from among qualified citizens of the States or Territories in which national forests are located.

Sec. 715k. Reservation protectors must be selected, when practicable, from qualified citizens of State in which to be employed.

Sec. 742c. Only citizen or national eligible for fishery loan.

Sec. 781. Aliens not included in prohibition against certain fishing beyond state territorial limits.

Sec. 797. Only citizens eligible for certain loans from Federal Power Commission.

Sec. 831a. Only citizens may be members of board of directors of Tennessee Valley Authority.

Sec. 1052. Educational and scientific facilities of National Fisheries Center and Aquarium available to aliens in certain cases only if reciprocity.

Sec. 1106. Only U. S. and Canadian citizens may be employees of Joint United States-Canadian Commission.

Title 18, Crimes and Criminal Procedure:

Sec. 242. Criminal sanctions imposed on one who conspires to injure a citizen in the exercise of certain rights.

Sec. 243. Citizens may not be disqualified from jury service on basis of race, color, etc.

App. Sec. 1202(a)(5). Aliens illegally in U. S. are criminally liable for receipt, possession, or transportation of firearms.

Sec. 4321. Board of Advisers of Federal Reformatory for Women to be composed of four citizens and others, as designated.

Title 19, Customs Duties:

Sec. 1330. Membership on U. S. Tariff Commission limited to citizens.

Sec. 1526. Protects citizens against trademark infringement.

Sec. 1586. Prohibition against unloading vessel within specified off-shore waters applicable only to citizens.

Sec. 1641. Custom house brokers required to be citizens.

Title 20, Education:

Sec. 46a. Secretary of Smithsonian Institution may employ aliens in a scientific or technical

capacity only where no qualified citizen available.

Sec. 72. The five general trustees of the National Gallery of Art must be citizens.

Sec. 77. Certain members of the National Air and Space Museum must be citizens.

Sec. 107a. Secretary of Health, Education and Welfare shall assist blind citizens to obtain concession licenses on Federal and other property.

Title 22, Foreign Relations and Intercourse:

Sec. 287n. U. S. representatives to the General Conference of UNESCO must be citizens.

Sec. 287p. Members of the National Commission on Educational, Scientific, and Cultural Cooperation must be citizens.

Sec. 526. Secretaries of Army and Navy shall protect patent rights of citizens in sales of war materials.

Sec. 816. Secretary of State may establish educational facilities for children of certain citizens stationed overseas.

Sec. 910. Foreign Service Officers must be citizens.

Sec. 922. Foreign Service Reserve Officers must be citizens.

Sec. 939. Foreign Service Staff Officers and employees must be citizens.

Sec. 1044. Secretary of State may employ noncitizens in Foreign Service Institute only in absence of suitably qualified citizens.

Sec. 1131. Secretary of State authorized to grant citizen officers and employees of Foreign Service certain representation allowances.

Sec. 1156. Secretary of State may authorize payments of certain medical expenses for citizen officers, employees, and their dependents stationed abroad.

Sec. 1157. Secretary of State may authorize payment of travel expenses in connection with medical treatment involving citizen Foreign Service officers, employees, and dependents stationed abroad.

Sec. 1158. Secretary of State shall provide for certain physical examinations of citizen Foreign Service officers, employees, and dependents stationed abroad.

Sec. 1177. Citizens dying abroad entitled to consular assistance following testamentary directions.

Sec. 1198. Consular officers liable for embezzlement of certain funds of citizens.

Sec. 1321, *et seq.* Certain citizens given nonquota immigrant status and other rights in Philippines.

Sec. 1448. Secretary of State may provide assistance to certain overseas institutions founded or sponsored by citizens.

Sec. 1451. Secretary of State may assign certain citizen employees to work with foreign governments.

Sec. 1471. Secretary of State may hire certain aliens only when qualified citizens unavailable.

Sec. 1631g. Certain debt claims may be made only by citizens.

Sec. 1641. Aliens denied access to certain claims funds.

Sec. 1796. Members of Joint Commission on Rural Reconstruction in China must be citizens.

Sec. 2103. President may appoint certain committees, composed only of citizens, to provide for international cooperation in health and medical research.

Sec. 2174. President may furnish certain assistance to schools, libraries, and hospital services overseas, if founded or sponsored by citizens.

Sec. 2198. Eligible investors in Overseas Private Investment Corporation generally limited to citizens or corporation controlled by citizens.

Sec. 2281. Joint Commissions on Rural Development to be composed of one or more citizens.

Sec. 2351. President shall assist citizens in obtaining just compensation for certain losses incurred in the course of international trade.

Sec. 2370. Assistance to certain foreign countries restricted where rights of citizens have been prejudiced.

Sec. 2385. President may appoint a citizen to the Inter-American Committee on the Alliance for Progress.

Sec. 2391. Chairman of Development Assistance Committee must be a citizen.

Sec. 2504. President may enroll citizens and nationals as Peace Corps "volunteers" for service abroad.

Sec. 2505. Peace Corps "volunteer leaders" must be citizens or nationals.

Sec. 2670. Secretary of State may pay costs involved in rescue of certain citizens.

Title 25, Indians:

Sec. 399. Lease of unallotted mineral lands within Indian reservations available to citizens.

Title 26, Internal Revenue Code:

Secs. 891, 896. Permits multiple taxation of aliens whose countries discriminate against U. S. citizens.

Sec. 911. Only citizens qualify for certain exemptions on income earned without the U. S.

Sec. 931. Citizens and domestic corporations qualify for certain exemptions on income derived from sources within U. S. possessions.

Sec. 941. China Trade Act corporations eligible for special deduction from taxable income for certain shares held by citizens.

Sec. 981. Only citizens may elect to receive certain benefits as to treatment of income subject to foreign community property laws.

Sec. 2014. Credit for foreign death taxes available to aliens only if reciprocity.

Sec. 6851. Alien may not generally depart the U. S. unless he first procures a certification that he has complied with all obligations imposed upon him by the income tax laws.

Sec. 7325. Appraisers of seized goods must be citizens.

Title 28, Judiciary and Judicial Procedure:

Sec. 1251(a)(2). Supreme Court has original and exclusive jurisdiction of all actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants.

Sec. 1251(b)(1). Supreme Court has original but not exclusive jurisdiction of all actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties.

Sec. 1251(b)(3). Supreme Court has original but not exclusive jurisdiction of all actions or proceedings by a State against aliens.

Sec. 1332. Suits between aliens only do not qualify for diversity of citizenship under this section.

Sec. 1350. District Courts have original jurisdiction in civil actions by aliens only for torts committed in violation of the law of nations or a treaty.

Sec. 1351. District courts have original jurisdiction, exclusive of the courts of the States, of all actions and proceedings against consuls or vice consuls of foreign states.

Sec. 1391. Aliens subject to suit in any district.

Sec. 1442(b). Personal action commenced in State court by an alien against any citizen of a State who is a civil officer of the United States and is a nonresident of such State removable to federal district court.

Sec. 1861. Only citizens eligible to serve on grand and petit juries in district courts.

Sec. 1862. Citizens may not be excluded from grand or petit jury service on account of race, religion, etc.

Sec. 1863. Jury commissions to be composed of citizens only.

*Sec. 1865. Grand or petit jurors in district court must be citizens.

Sec. 1872. Issues of fact to be tried by a jury in all original actions at law against citizens in the Supreme Court.

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* Constitutionality upheld in *Perkins* v. *Smith*, 370 F. Supp. 134 (D. Md.), appeal pending No. 73-1915.

Sec. 2502. Aliens may prosecute actions in Court of Claims only if they establish reciprocity as a jurisdictional prerequisite.

Title 30, Mineral Lands and Mining:

Sec. 22. Mineral deposits on U. S. owned lands open to exploration and purchase only by citizens and those declaring intent to become same.

Sec. 49a. Only citizens, and those declaring intent to become same, obtain benefit of U. S. mining laws as made applicable to Alaska.

Sec. 71. Only citizens, and those declaring intent to become same, have right to enter certain coal lands of the U. S.

Sec. 181. Certain mineral deposits on lands owned by the U. S. may be disposed of only to citizens of U. S., and to foreign citizens where reciprocal rights exist.

Sec. 323. Citizens may not be prevented from using patents acquired by the Secretary of Interior under this section.

Sec. 1015. Leases for use of geothermal resources to be issued only to citizens and certain associations and corporations organized under the laws of the U. S.

Title 31, Money and Finance:

Sec. 492a. Disbursing officers in foreign countries authorized to cash checks drawn on the

Treasurer of the United States for the accommodation of citizens only.

Title 32, National Guard:

Sec. 313. Officers in National Guard must be citizens.

Title 33, Navigation and Navigable Waters:

Sec. 8. Citizens entitled to toll-free use of certain Alabama rivers.

Sec. 702d-1. Secretary of Army authorized to grant certain easements only to citizens.

Title 36, Patriotic Societies and Observances:

Sec. 25. Executive Board of Boy Scouts of America to be composed of citizens.

Sec. 34. Members of National Council of Girl Scouts of America shall be citizens.

Sec. 45. Membership in American Legion restricted to citizens.

Sec. 97. Membership in American War Mothers restricted to citizens.

Sec. 341. Certain citizens designated members of American Society of International Law.

Sec. 426. Members of Corregidor Bataan Memorial Commission must be citizens.

Title 38, Veterans' Benefits:

Sec. 235. Citizen employees of the Veterans Administration assigned to Philippines and

Europe entitled to certain allowances and benefits.

Sec. 624. Only citizen veterans eligible for certain medical services abroad.

Sec. 1502. Veterans eligible for certain vocational rehabilitation only if they were citizens at the time of service.

Sec. 4105. Only citizens eligible for appointment to certain positions in Department of Medicine and Surgery, unless qualified citizens not available (38 U.S.C. 4114).

Title 40, Public Buildings, Property, and Works:

Sec. 71a. National Capitol Planning Commission to be composed of 5 citizens, and other designated persons.

Sec. 782. Ownership, operation, or control by aliens of certain U. S. long-lines communication facilities in Alaska prohibited.

Title 41, Public Contracts:

Sec. 49. Defense contractors required to accept certificate of honorable discharge from U. S. armed forces as equivalent to birth certificate, except in case of aliens.

Title 42, The Public Health and Welfare:

Sec. 204. Commissioned officers in the Public Health Service must be citizens.

Sec. 417(h). Only citizens shall be considered World War II veterans for purposes of certain benefits.

Sec. 428. Only citizens and aliens admitted for permanent residence and residing in U. S. for five years eligible for certain pension benefits at age 72.

Sec. 1313. Only destitute citizens and dependents thereof entitled to receive temporary assistance upon return to U. S. from foreign countries.

*Sec. 1395. Only citizens and aliens admitted for permanent residence and having resided continuously in U. S. for five years eligible for supplementary medical insurance benefits.

Sec. 1396. Citizens may not be excluded from State medical assistance plans.

Sec. 1869. Only citizens and nationals eligible for certain scientific scholarships.

Sec. 1922. Only citizens eligible for Department of Justice medals for character and service.

Sec. 1971. Voting rights of citizens only protected.

Sec. 1973. Voting rights of citizens may not be denied or abridged on account of race or color.

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* Declared unconstitutional in *Diaz* v. *Weinberger*, 361 F. Supp. 1 (S.D. Fla.), appeal pending sub nom. *Weinberger* v. *Diaz*, No. 73-1046, probable jurisdiction noted May 13, 1974.

Sec. 1975. Commission on Civil Rights shall investigate allegations that citizens have been denied voting rights.

Sec. 1982. Property rights of citizens protected.

Sec. 2031. Members of Atomic Energy Commission must be citizens.

Sec. 2133. Issuance of atomic energy licenses to aliens or alien owned or controlled corporation prohibited.

Sec. 2134. Issuance of atomic energy licenses for purposes of medical therapy, etc., to alien owned or controlled corporations prohibited.

Title 43, Public Lands:

Sec. 145. Secretary of Interior empowered to sell certain public land to citizens.

Sec. 161. Homestead land grants available to citizens and those declaring intent to become same.

Sec. 178. Only citizens may obtain title to certain lands in New Mexico by adverse possession.

Sec. 231. Certain citizen entrymen eligible for optional leave of absence from homestead lands.

Sec. 270. Only citizens eligible for certain homestead rights in Alaska.

Sec. 272a. Soldiers' and sailors' homestead rights restricted to citizens.

Sec. 315b. Grazing permits available only to citizens and those filing necessary declaration of intent to become same.

Sec. 321. Rights in desert-lands available to citizens and those declaring intent to become same.

Sec. 329. Land patents available only to citizens.

Sec. 364c. Membership on advisory committees to Board on Geographic Names restricted to citizens.

Sec. 375. Land patents available only to citizen bidders.

Sec. 682c. Leases and sales of public lands may be made only to citizens or to aliens who have filed a declaration of intent to become citizens.

Sec. 687a. Land purchases in Alaska limited to citizens.

Sec. 897. Relief granted to purchasers of patents from railroads when purchasers are citizens or have declared their intention to become same.

Sec. 898. Purchase rights extended only to citizens, and those declaring intent to become same.

Sec. 942-6. Certain rights-of-way in Alaska available only to citizens.

Secs. 956, 966. Rights-of-way through certain public lands available only to citizens.

Sec. 992, *et seq.* Citizens granted preferred right to file applications for purchase of certain meandered lands.

Sec. 1062. U. S. Attorney has duty to institute civil action on behalf of citizens only for improper closure of public lands.

Sec. 1092. Land patents in Oklahoma available only to citizens.

Sec. 1100. Mineral patents in Oklahoma available only to citizens.

Title 45, Railroads:

Sec. 543. Officers and directors of National Railroad Passenger Corporation must be citizens.

Title 46, Shipping:

Sec. 11. Establishes citizenship requirements with respect to registry of vessels engaged in coastwise trade and mail service contracts.

Sec. 13. Foreign built vessels admitted to coastwise trade only if owned by citizens.

Sec. 122. Citizen-owned coasting and fishing vessels not subject to duties.

Sec. 146. Goods exempt from discriminating duty if imported on citizen-owned vessels.

Sec. 221. Officers of U. S. vessels must be citizens.

Sec. 242. Registry as staff officer in U. S. merchant marine limited to citizens.

Sec. 785. Aliens may prosecute an action under the Suits in Admiralty Act only if they establish reciprocity as a jurisdictional prerequisite.

Sec. 834. Secretary of Treasury may deny clearance to vessels which refuse to accept freight of citizen.

Sec. 865. Secretary of Commerce may sell vessels to aliens only if unable to find a suitable citizen buyer.

Sec. 866. Preferences given to citizens in establishment and operation of certain steamship lines.

Sec. 922. Citizens given preference in obtaining ship mortgages.

Sec. 1126. Only citizens eligible for training in United States Maritime Service.

Sec. 1132. All licensed officers of U. S. documented vessels must be citizens; all crew members must be citizens if vessel built or operated with Government subsidy.

Sec. 1151. Only citizens may apply for vessel construction differential subsidies.

Sec. 1159. Only citizens may apply for aid in construction of new vessels.

Sec. 1160. In order for vessel to be "obsolete" for purposes of purchase by the Secretary of Commerce under this section, vessel must have been owned by a citizen for three years prior to purchase.

Sec. 1161. Only citizens eligible for certain construction reserve funds for vessels.

Sec. 1171. Only citizens eligible to apply for operating-differential subsidies where vessel to engage in foreign commerce.

Sec. 1177. Only citizens may enter into agreement with Secretary of Commerce to establish capital construction fund.

Sec. 1213. Citizens given preference in award of contracts under this chapter.

Sec. 1283. Only citizens qualify for certain war-risk insurance.

Sec. 1402. Only citizens may apply to Secretary of Interior for fishing vessel construction subsidies.

Title 47, Telegraphs, Telephones, and Radiotelegraphs:

Sec. 17. Only citizens may own, operate, or control telegraph lines in Alaska.

Sec. 154. Members of Federal Communications Commission must be citizens.

Sec. 222. Consolidation or merger of telegraph carriers, if more than one-fifth of capital stock will be owned, controlled or voted directly or indirectly by aliens as a result, prohibited.

Sec. 303. Aliens generally ineligible for radio station licenses.

Sec. 310. Aliens ineligible for amateur radio station license under certain circumstances.

Sec. 733. Directors and officers of the Communications Satellite Corporation must be citizens.

Sec. 734. Participation by aliens in Communications Satellite Corporation restricted.

Title 48, Territories and Insular Possessions:

Sec. 874. All judicial officials in Puerto Rico must be citizens.

Sec. 892. Resident Commissioner of Puerto Rico must be a citizen.

Sec. 1405p. Restricts franchise in Virgin Islands to citizens.

Sec. 1414. Citizens granted exclusive privileges with respect to obtaining and selling the products of certain guano deposits.

Sec. 1422. Governor and Lieutenant Governor of Guam must be citizens.

Sec. 1423f. Members of Guamian legislature must be citizens.

Sec. 1501, *et seq.* Right of aliens to acquire, own, or convey land in U. S. Territories, or U. S. public lands restricted.

Sec. 1509. Aliens ineligible to purchase public land in Hawaii unless they have declared their intent to become citizens.

Sec. 1542. Franchise in Virgin Islands restricted to citizens.

Sec. 1543. All officials of the government of the Virgin Islands must be citizens.

Sec. 1572. Members of Virgin Island legislature must be citizens.

Sec. 1591. Only citizens eligible for election as Governor or Lieutenant Governor of the Virgin Islands.

Title 49, Transportation:

Sec. 1304. Only citizens have a public right of freedom of transit through navigable U. S. air space.

Sec. 1321. Members of Civil Aeronautics Board must be citizens.

Secs. 1341, 1342. Administrator and Deputy Administrator of Federal Aviation Administration must be citizens.

Sec. 1401. Only citizens may register aircraft.

Sec. 1422. Administrator of Civil Aeronautics Board has discretion to prohibit or restrict issuance of airman certificates to aliens dependent on terms of reciprocal agreements entered into with foreign governments.

Title 50, War and National Defense:

Sec. 855. Aliens trained in foreign espionage system subject to deportation for failure to register with the Attorney General.

App. Sec. 5. Property owned by aliens subject to freezing or vesting in times of war or national emergency.

App. Sec. 10. Only citizens may apply to President for license to use enemy patents.

App. Sec. 12. Alien Property Custodian may sell vested property to citizens only.

App. Sec. 454. Liability for military training and service limited to citizens and aliens admitted for permanent residence.

App. Sec. 460. Members of Selective Service boards must be citizens.

App. Sec. 572. Certain benefits available to citizens serving with war allies of U. S.

App. Sec. 2004. Payment of detention benefits authorized only to certain citizens captured by Japanese Government during World War II.

App. Sec. 2014. Compensation authorized for certain citizens serving in allied forces and captured by enemy.

App. Sec. 2015. Citizen merchant seamen eligible for detention benefits arising out of World War II.

App. Sec. 2017. Only citizens and nationals proper claimants before Foreign Claims Settlement Commission.

App. Sec. 2272. Members of Civil Defense Advisory Council must be citizens.

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